No. 80572-5

SUPREME COURT OF THE STATE OF WASHINGTON

MARTIN SCHNALL, et al.,

Respondents,

v.

AT&T WIRELESS SERVICES, INC.,

Petitioner.

RESPONSE TO *AMICI CURIAE* BRIEF OF "CERTAIN WASHINGTON-BASED COMPANIES"

Daniel F. Johnson, WSBA No. 27848
David E. Breskin, WSBA No. 10607
BRESKIN JOHNSON & TOWNSEND, PLLC
1111 Third Avenue, Suite 2230
Seattle, WA 98101
Telephone (206) 652-8660

William W. Houck, WSBA No. 13224
HOUCK LAW FIRM, P.S.
4045 262nd Ave. SE
Issaquah, Washington 98029
Telephone (425) 392-7118

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Plaintiffs Martin Schnall, Kelly Lemons and Nathan Riensche reply to the Brief of Amicus Curiae on behalf of Certain Washington Based Companies ("Amici" or "companies") as follows:

I. INTRODUCTION

The Amici brief sets up a series of hypothetical arguments that have nothing to do with the facts of this case, the disputed consumer practices or the claims asserted by the Plaintiffs and the putative Class. Indeed, the brief does not cite to a single part of the record to support any of its arguments. Amici do not even address the factual findings of the trial court in its choice of law analysis in which the court examined the evidentiary record of the contacts and relationship between Washington to the claims asserted, compared those contacts and relationship to other states, and ultimately concluded that Washington had the most significant relationship to the claims. The trial court considered the same arguments raised by Amici on causation and Washington law and found that it was proper to apply the Washington CPA to all subscribers of AT&T Wireless Services ("AWS") because AWS is a Washington based corporation and its sales and billing practices that were created, implemented, controlled and used nationwide for all AWS customers from the company's headquarters in Redmond, Washington. Amici do not argue that the trial court erred or abused its discretion in reaching that conclusion based upon the evidentiary record before it.

Amici's goal is transparent: they seek to use *Indoor Billboard*'s causation analysis as a springboard to preventing class certification under the Washington Consumer Protection Act under any facts by simply re-characterizing a

consumer's claim arising from a common deceptive sales or billing practice as one requiring individual reliance to prove causation and by urging adoption of a *per se* rule that causation in CPA cases can only be established in one way.

Here, consumers purchased a monthly service from AWS pursuant to nationwide calling plans which were always stated at a set monthly price for a set number of minutes of service, without disclosing that an added nominal charge in the form of a "universal connectivity charge" ("UCC") would be added. AWS chose to add this charge to the consumer's monthly service bill even though it was not disclosed as part of the purchase price and chose to characterize the charge as a "tax" when it was not, with the result that consumers paid more for their service than the advertised price. Because the amount charged for the UCC is so small, it is impracticable for consumers to seek recovery on an individual basis and a class action is the only effective means for redressing the disputed practices. Without such redress, AWS will continue to retain the benefit of having unfairly and deceptively collected from consumers hundreds of millions of additional dollars from its customers, a dollar or two at a time.

Because Washington courts have found the type of sales and billing practices that AWS engaged in to be unfair and deceptive consumer practices under the CPA as matter of law, Amici seek to eliminate the possibility of certification in cases where such practices result in individually small damage claims, on the basis of "causation." To do so, Amici must launch into hypothetical and meritless assertions that causation cannot be established except on a individualized basis, even though AWS applied its unfair and deceptive sales and

billing practices to all consumers in the same manner and these practices were a proximate cause of injury and damage to all consumers.

Accordingly, if a class action cannot be certified on the common sales and billing practices of AWS at issue, as Amici assert, then no CPA case in Washington could be. Such a result would be contrary to the Legislature's directive to construe the CPA broadly, and to public policy and case law favoring class certification of small but common consumer claims that affect the public interest. *See* RCW 19.86.920. .

II. ARGUMENT

A. Amici's Causation Arguments are Based Upon a Lack of Knowledge of the Facts, Practices, and Claims.

Amici argue that individual issues would predominate on causation because each consumer would have to show that they "saw the advertising at issue." The argument fails in the context of the wireless market, where the service is always sold at a stated recurring monthly price for service at a stated number of minutes. Consumers have come to expect these terms of service. For example, AWS sells all consumers calling plans at a rate of $29.99 per month for 250 minutes, or $39.99 per month for 400 minutes of service, or some other set monthly price for a set number of minutes of service.[1]

The point of this case is that AWS actually bills more than the advertised price, by adding a "universal connectivity charge" to the monthly price.[2] The plans are *always sold* by AWS without disclosing that the price includes an

---

[1] See, e.g., AWS rate plan brochure at AGU-SCH 04207-04209, appended hereto for the convenience of the Court as **Appendix A.**

[2] During the relevant time period, AWS first charged consumers a UCC of 65 cents per month, and then changed the charge to .84% of the consumer's total monthly bill.

added UCC surcharge. To sell their calling plans, AWS used calling plan brochures, in-store hand-outs, newspaper advertising and other advertising. However, it is immaterial *which* particular calling plan brochure or advertising the consumer saw or which particular calling plan the consumer was sold, because *all of the brochures* and *all of the advertising* only stated the monthly calling plan price for the monthly number of minutes of service, *without* including the added UCC surcharge. None of AWS' advertising disclosed the true total monthly price for service.

AWS used common sales and billing practices in selling its calling plans. Whether these common sales and billing practices were unfair or deceptive raised common issues that affect all class members and predominated over any issue affecting only individual consumers. Hence, certification under CR 23 was proper. Indeed, the numerosity, typicality and scale of this case present the quintessential facts for class certification.

In their brief, Amici attempt to demonstrate that individual issues would predominate by asking the Court to canvass the various forms of marketing brochures and advertising campaigns used by AWS to sell its calling plans, and consider the effect of those campaigns on individual consumers. But in doing so, Amici demonstrate that they do not understand the Plaintiffs' claim and are simply trying to recast the claim in a way that creates hypothetical and phony "individual issues." It does not matter what form of advertising each individual consumer received or considered, because AWS always sold its services through calling plans and every form of calling plan did not state the true price of

monthly service because they did not disclose the added cost of the "universal connectivity charge" on top of the monthly calling plan price. Thus, the "advertising at issue" is the common practice of AWS stating a calling plan's monthly price without stating the actual total price that included the extra UCC surcharge. See, Robinson v. Avis Rent a Car, 106 Wn.App.104, 116, 22 P.3d 818 (2001) (failure to disclose the true cost of service is a deceptive practice as a matter of law).

AWS' billing practice of adding this undisclosed UCC to the consumer's bill was an unfair and deceptive practice under the CPA. Its practice of placing the UCC in a segregated section of the bill along with the state sales tax and other taxes that *were* taxes on the consumer was also a deceptive practice, because the UCC is not a "tax" or government mandated charge that AWS had to collect from consumers. It is a discretionary charge that AWS chose to bill consumers for its overhead expense of contributing to the universal service fund. The charging of a UCC is akin to AWS charging consumers for the expense of obtaining a city business license or the expense of paying property taxes on its towers and headquarters in Washington.

AWS acted in a deceptive manner that violated the CPA in the same way that the automobile dealerships in Nelson v. Appleway Chevrolet, Inc., 160 Wn.2d 173, 157 P.3d 847 (2007), did when they chose to tack onto the consumer's bill after the sale, their overhead expense of paying the Washington state B&O tax. In both instances the charge was not a tax on the consumer, but

an expense that the seller chose to pass onto consumers as a separate line item on the bill without including it in the advertised sales price.

In the context of *this* case, the term "advertising" is used in the same broad way that it is defined in the False Advertising Act, RCW 9.04.010, .050 to include *any* type of communication to the consumer which is intended to directly or indirectly sell the consumer a good or service.[3] The Washington CPA prohibits sales and billing practices that are either "unfair" or deceptive. An "unfair" practice may be shown under the CPA by showing that the consumer practice at issue violates a statute that was intended to protect consumers. Magney v. Lincoln Mut. Sav. Bank, 34 Wn. App. 45, 57, 659 P.2d 537 (1983) (quoting FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n.5, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972)). The False Advertising Act is one such statute. [4]

---

[3] See. RCW 9.04.010. False advertising, stating in pertinent part, emphasis added:

> **Any ... corporation ... with intent to sell ... service ... to the public for sale**... or induce the public in any manner to enter into any obligation relating thereto, ... **makes, publishes, disseminates, circulates or places before the public ... in a newspaper or other publication, or in ... a bill, circular, pamphlet ... or any other way, an advertisement of any sort regarding... service ... which advertisement contains any assertion, representation** or statement of fact **which is untrue, deceptive or misleading**, shall be guilty of a misdemeanor.

RCW 9.04.050. False, misleading, deceptive advertising, stating in part, emphasis added:

> **It shall be unlawful** for any person **to publish, disseminate or display, ... in any manner or by any means ...any false, deceptive or misleading advertising,** with knowledge of facts which render the advertising false, deceptive or misleading, **for any ... commercial purpose or for the purpose of inducing, or which is likely to induce, directly or indirectly, the public to purchase... any ... service,** or to enter into any obligation or transaction relating thereto.

[4] The Washington Legislature directed that the CPA should be liberally construed to "complement the body of federal law governing...unfair, deceptive and fraudulent acts or practices in order to protect the public and foster fair and honest competition." The Legislature intended that the Courts be guided by the decisions of the FTC in interpreting similar federal legislation. RCW 19.86.920. The FTC has interpreted the Federal Trade Commission Act's provision prohibiting "unfair" consumer practices to include those which violate statutory prohibitions. FTC v. Sperry & Hutchinson Co., supra.

The Plaintiffs' claim is not only similar to the claim made by the Plaintiffs in Nelson v. Appleway Chevrolet, supra., but also the claim made in Nelson v. Nat'l Fund Raising Consultants, Inc., 120 Wn.2d 382, 842 P.2d 473 (1992). There, the plaintiffs claimed that the defendant engaged in a deceptive practice in violation of the CPA by billing the plaintiffs a 20% mark-up on goods purchased for the plaintiffs' franchise business, when defendant had failed to disclose the mark-up prior to sale. Defendant argued that it did not act deceptively because the the *fact* of the mark-up *was* disclosed prior to sale, even if the *amount* of the mark-up had not been disclosed. This Court held that defendant's failure to disclose the *amount* of the mark-up was a deceptive practice that violated the CPA as a matter of law.

Amici argue in their brief that Plaintiffs do not claim that the practices at issue are *"intrinsically" or "inherently"* unfair or deceptive. Whatever Amici exactly mean is unclear, but Plaintiffs do allege that AWS' sales and billing practices are inherently and intrinsically unfair and deceptive consumer practices.[5] As this Court observed in Nelson v. Appleway Chevrolet, Inc., supra., all sellers of goods and services are entitled to charge whatever price they wish for their goods and

[5] Perhaps Amici mean that since the FCC permits companies to charge a universal service fund fee, the FCC permits companies, like AWS, to do so in an unfair and deceptive manner by not disclosing the charge pre-sale, then tacking it onto the consumer's bill and making it look like a tax imposed on the consumer. Amici ignore the Joint FCC/FTC Policy Statement For Advertising which ruled that telecommunication advertising must be truthful and not misleading and that the cost of a product or service is an example of an attribute presumed material. 15 FCC Rcd 8654, 8655 (FCC 2000) and FCC "Truth-in-Billing" orders requiring non-deceptive disclosures of added discretionary fees. Additionally, in Peck v. Cingular Wireless Services, LLC., 535 F.3d 1053 (9th Cir. 2008), the court held that Plaintiffs' claim that Cingular deceptively added an undisclosed Washington B&O tax surcharge to its consumer's bill in violation of the Washington CPA was not preempted under federal law. Accordingly, AWS' deceptive billing practices may also be regarded as "inherently" and "intrinsically" unfair and deceptive under the Washington CPA.

services that the market will bear. But that said, this Court found that it was not permissible to put an added, undisclosed B&O tax fee on the consumer's bill, *after* the car had been sold for a stated and agreed upon price, when the added fee was not a tax on the consumer but part of the dealership's overhead cost of doing business in Washington without full disclosure of the costs of service when the consumer makes the purchase decision. Here, too, the inherently unfair and deceptive practice is tacking onto the consumer's bill an additional surcharge, when the consumer was sold a calling plan without that surcharge.

AWS could have sold subscribers a service plan in a fair and non-deceptive manner by stating a set monthly price that *included the UCC*, so that the actual stated price was not, for example, $39.99 per month, but $40.65 per month. Equally, AWS could have sold its calling plans at a set monthly price for service, but also stated next to the price in a clear and conspicuous manner that the final purchase price was not $39.99, but $39.99 plus an additional 65 cents or .84% for a UCC charge. AWS chose not to disclose the fee in their advertising. Instead, it advertised calling plans at one price and billed consumers at a higher price that included a UCC mark-up. The fact that major businesses in Washington such as the Amici herein fail to appreciate that it is inherently unfair and anti-competitive to sell consumers a calling plan at one monthly price for a set number of minutes of service and then charge them a higher monthly price on their bill demonstrates why consumer class actions are so important to the effective enforcement of the CPA. The Attorney General himself makes this argument in his amicus brief.

In their brief, Amici fail to even address the intrinsically unfair and deceptive practice of presenting the consumer with a monthly bill in which the UCC is shown as another "tax" or mandatory government "surcharge" in a section that includes the Washington sales tax and other mandatory governmental charges imposed on consumers. It is noteworthy in this regard, again under the broad definition of "advertising" embraced by the Washington False Advertising Act, that misleading statements in *"bills"* are also prohibited by the statute. RCW 9.04.010.[6]

Ultimately, because Amici address only their mischaracterization of Plaintiffs' claim, their analysis of the issues under Indoor Billboard is neither helpful nor informative. As this Court recognized in Indoor Billboard, proof of causation, particularly at the summary judgment stage of the proceedings or at trial, will invariably depend upon the nature of the claim asserted by the Plaintiff. Under Indoor Billboard, "but for" causation is a flexible standard that requires only a showing that the disputed practice was *a* proximate cause of the plaintiff's injury. See WPI 310.07. As set forth in the WPI, the disputed practice does not have to be the sole or exclusive cause. There may be more than one proximate cause to any injury.

The Court of Appeals recognized in its opinion (as did the Attorney General and WSTLA in their amicus briefs) that injury and causation can be established by showing that the subscriber paid more for monthly service than the advertised and agreed upon price. Because AWS applied its sales and billing

[6] While the False Advertising Act is a criminal statute, it clearly states the public policy of Washington with regard to the types of sales and billing practices for services that are *"intrinsically"* or inherently unfair and deceptive. AWS' practices fall within these categories.

practices to all consumers in the same manner, Plaintiffs established for class certification purposes a common course of conduct that caused all AWS subscribers injury in the same way.

While the Plaintiffs' claims are similar to the claims made by the plaintiffs in Nelson v. Appleway Chevrolet and Nelson v. Nat'l Fund Raising Consultants, Inc., the trial court applied a very different causation standard to the Plaintiffs' claims that had nothing to do with the claim that they were billed more than the calling plan price f when AWS added onto their bill post-sale mark-up made to look like a tax. In denying class certification, the trial court ruled that the *only way* a consumer could show he was harmed by the Defendants practice was to show he relied on the failure of AWS to disclose the UCC as an added cost of monthly service, and that the *only way* any subscriber could meet this reliance test was to show that he or she would have chosen a different service provider. This ruling was clear error, because the Plaintiffs can establish that a proximate cause of their injury was the billing of an undisclosed UCC mark-up after they purchased a calling plan at a set price yet had to pay the UCC on top of that price. But for AWS' decision to bill the undisclosed UCC mark-up, no subscriber would have been injured and they would have gotten what they purchased, a calling plan for $39.99 per month for 400 minutes of service.[7]

---

[7] In this regard, it bears noting that Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 170 P.3d 10 (2007) was a review of an order granting *summary judgment* not a motion for *class certification*. In Indoor Billboard, causation could not be established *solely* from payment of the bill because the claim was *not* that the Plaintiff paid a higher price for monthly service due to the company tacking onto the bill an undisclosed added PICC charge. The plaintiff's claim in Indoor Billboard was that the defendant affirmatively misrepresented to him that part of the total price was for a PICC charge, which was false, and he relied on that misrepresentation when he paid the agreed price. At the class certification stage, as WSTLA and the Attorney General point out in their amicus briefs, Plaintiff should not be required to present a

Amici concede, as they must, that if the trial court applied the wrong legal standard in analyzing Plaintiffs' burden of proving causation, then its order was error and must be reversed. Yet Amici vaguely suggest that the trial court may have applied the correct legal standard. Amici make this suggestion from a lack of understanding of both the Plaintiffs' claim and the trial court's action.

As discussed above, based on the nature of Plaintiffs' claim, it makes no sense to require (as the trial court did) that the *only way* for Plaintiffs to establish causation was by proving they relied on AWS' failure to disclose the added charge of service in the sense that they would have acted differently by choosing a different service provider. Instead, Plaintiffs should be permitted to prove causation by showing all facts and circumstances relating to AWS' sales and billing practices which would include the sequence of deceptive and unfair acts that led to their injury. This sequence of acts included the decision by AWS to bill more than the advertised and agreed upon price of monthly service by charging the undisclosed UCC mark-up.

The trial court did not impose a "but for," proximate cause" standard of proof. The trial court erred by imposing a "one-size fits all," *per se* rule of law in cases involving undisclosed and deceptively billed mark-ups, that every consumer can only prove causation on a CPA claim by proving individual reliance on the seller's failure to disclose the added mark-up for service pre-sale and *only* by showing that he or she would have chosen a different seller if the information had been disclosed. The trial court's approach was the antithesis of

---

full blown evidentiary record of all facts that would establish causation sufficient to withstand summary judgment.

the flexible "but for" or "proximate cause" standard of proof of causation that this Court articulated in Indoor Billboard. The trial court's approach deprived Plaintiffs of the very thing that this Court found reversible error in Indoor Billboard, i.e. depriving the plaintiff of the opportunity to present its legal theory of causation to the jury through consideration of facts demonstrating that the defendant's deceptive conduct was a proximate cause of plaintiff's injury.

B. Amici's Arguments Regarding Application of the CPA to All AWS Customers Are Misplaced and Fail to Show The Trial Court Erred.

Amici fail to address, much less identify an abuse of discretion in, the trial court's findings of fact that are the necessary predicate to the application of Washington's choice of law analysis.[8] The trial court was required to analyze the facts relating to Washington's contacts and significant relationship to the claims asserted. Based upon those factual findings and the evidentiary record presented by the parties, the court concluded that Washington had the most significant relationship to the Plaintiffs' claims. CP 417-418. Instead of showing how the trial court's analysis in *this* case based upon the evidentiary record before it was in error, Amici argue for a sweeping rule of disengagement on the part of Washington courts in policing the unfair and deceptive consumer conduct on the part of Washington corporations.

Amici's argument that Washington Courts should not apply Washington law or a single state's law to the claims of all their customers is particularly baffling because the majority of these companies in fact *require* in their standard

[8] The trial court's findings of fact are considered "verities" on appeal under an abuse of discretionary standard, while application of the legal rules governing choice of law is subject to *de novo* review. Erwin v. Cotter Health Centers, 161 Wn.2d 676, 167 P.3d 1112 (2007).

form contracts with consumers that *Washington law* apply. See, e.g. Amazon.com's consumer contract, **Appendix B,** which provides:

> The laws of the state of Washington, without regard to principles of conflict of laws, will govern this agreement and any dispute of any sort that might arise between you and Amazon.

See, also, the consumer contracts of Amici Microsoft, **Appendix C**, and Holland America, **Appendix D**.

Thus, while lobbying this Court to disown the "Headquarters State" rule approved by the Supreme Court in Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-822, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985) and most recently applied by the Western District of Washington in a case involving Amicus Microsoft, Kelley v. Microsoft Corp., 251 F.R.D. 544 (W.D. Wash. 2008), these same Amici companies want to preserve for themselves application of the law of the state of Washington, where they are headquartered, in all their disputes with their consumers.[9]

1. The Trial Court and Appellate Court Were Right.

Both the trial court and appellate court correctly analyzed the choice of law issue by applying the Restatement of Conflicts of Law and finding that Washington had the most significant contacts based on the record in this case.

Here, the trial court found that the most significant relationships were in Washington based upon the following factual findings: (1) the relevant evidence and witnesses were in Washington; (b) the common and uniform marketing materials, service agreements and sales practices at issue were created and

[9] Amicus Clearwire Corporation requires in its consumer contracts application of a single state's law – the state of its incorporation, Delaware. **Appendix E.**

implemented by AWS in Washington; and (c) the disputed billing and disclosure decisions were made by AWS in Washington. The trial court also considered that Washington has a strong interest in regulating the activities of Washington businesses. Furthermore, as a Washington business, AWS was subject to Washington law. These are significant factors which the trial court correctly applied to conclude that the Washington CPA applied to the claims. Schnall v. AT&T Wireless Servs., Inc., 139 Wn. App. 280, 294, 161 P.3d 395 (2007).

In a similar case, involving Microsoft's deceptive practices in a nationwide class action, the Federal District Court for the Western District of Washington held that the most significant contacts test requires that Washington law apply. Kelley v. Microsoft Corp., 251 F.R.D. 544 (W.D. Wash. 2008), citing, Second Restatement of Law on Conflict of Laws (1971). The Kelley court reasoned that:

> Washington has a paramount interest in applying its law to this action. The CPA targets all unfair trade practices either originating from Washington businesses or harming Washington citizens. Application of the CPA to Plaintiffs' claims effectuates the broad purpose of the CPA and its deterrent purpose, especially as applied to one of Washington's most important corporate citizens. See Restatement § 145 cmt. c; RCW 19.86.920. Application of Washington law to both of Plaintiffs' claims is neither arbitrary nor unjust.

Id. at 20. In Kelley, the court applied Washington law to the claims of a nationwide class related to Microsoft's alleged misrepresentation that certain computers were "Vista Ready", when they were not.

The Amici companies in this action ignore § 145 of the Restatement and ask the Court to apply only §148 of the Restatement. Consideration of both sections is important. However, the outcome is the same – the trial court correctly reasoned on the facts before it that Washington law should apply. As

stated in Kelley, "[t]he place of injury is of lower importance in a case of deceptive trade practices or misrepresentation. The Restatement suggests that "when the place of injury can be said to be fortuitous . . . as in the case of fraud and misrepresentation . . . there may be little reason in logic or persuasiveness to say that one state rather than another is the place of injury . . . ." Restatement § 145 cmt. e. In such a case, the state in which the fraudulent conduct arises has a stronger relationship to the action. *Id.* Where the defendant's conduct causes harm in two or more states, the "place where the defendant's conduct occurred will usually be given particular weight in determining the state of the applicable law." *Id.* Here, AWS' unfair and deceptive acts caused injury throughout the country. The location of the harm suffered is fortuitous. See *id.* The justification of this rule is plain: a defendant with a nationwide false and misleading practice should not be able to insulate itself by scattering claims over 50 states.

2. Cases Cited by Amici Do Not Support its Position.

The Amici companies also argue that courts across the country reject the "Headquarters State Approach" to choice of law for consumer claims and cite, among others, the case of State Farm Mutual Auto Insurance Company v. Campbell, 538 U.S. 408, 422 (2003). This case stands for exactly the opposite of what the Amici argue. The Supreme Court held that, "A basic principle of federalism is that each state may make its own reasoned judgment about what conduct is permitted or proscribed within its borders." Id. at 422 (emphasis added). Since State Farm is an Illinois Corporation, the Supreme Court held that the state of Nevada could not apply its punitive damages laws to other states. In

contrast, Washington can apply *its* laws to *its* corporate citizens. See Shutts, 472 U.S. at 821-822.

The Amici companies also cite product liability cases that have no similarity with this case. They cite Bridgestone/Firestone Inc. Tires Product Liability Litigation, 288 F.3d 1012 (7th Cir. 2002), even though no choice of law analysis was done in that case, because of the complicated fact pattern involving the product liability claims asserted in the case. Also, Bridgestone/Firestone was abrogated in part by Thorogood v. Sears Roebuck & Co., 2007 U.S. Dist. LEXIS 81035, 2-6 (N.D. Ill. Nov. 1, 2007). Amici cite Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1184 (9th Cir. 2001), involving defective pacemakers, but the lawsuit in that case was brought in California, which was not the state where the defendants were headquartered and no Restatement § 145 and § 148 analysis was undertaken. Amici cite Spence v. Glock, GES.m.b.h., 227 F.3d 308 (5th Cir. 2000), which involved defective handguns that were designed and sold from Austria. Therefore, the court held, Georgia law did not apply. See, also, Barbara's Sales, Inc. v. Intel Corp., 227 Ill. 2d 45 (Ill. 2007) (an action filed in Illinois against a defendant, Intel, that was headquartered in California), and Harvell v. Goodyear Tire & Rubber Co., 2006 OK 24 (Okla. 2006) (a case filed in Oklahoma against a defendant headquartered in Ohio).

Even the Illinois courts, which declined to certify a nationwide class action in one case cited by Amici, certified a nationwide class in another case. See, e.g., Avery v. State Farm Mutual Automobile Insurance Co., 216 Ill. 2d 100, 835 N.E.2d 801, 296 Ill. Dec. 448 (2005) (denying certification because Illinois CPA

did not have out-of-state reach), but later distinguished by, Hall v. Sprint Spectrum L.P., 376 Ill. App. 3d 822, 824 (2007) appeal denied, 226 Ill.2d 614 (2008), allowing nationwide class. Finally, Amici argue that this Court's decision in McKee v. AT&T Corp., 191 P.3d 845 (2008) would bar application of the Washington CPA to claims of all subscribers against AWS based upon the fact that AWS was headquartered in Washington, without regard for whether Washington has the most significant relationship to the claims asserted. The argument is unpersuasive.

First, in McKee, this Court held that Washington law *did apply*, precisely because Washington had the most significant relationship to the claims, its interest was paramount to that of New York and New York had no compelling interest in applying its law to the claims. This Court's choice of law analysis was confined to the Restatement § 188 (Contracts), not Restatement § 145 (Tort) and § 148 (Misrepresentation), which would have bearing on the choice of law, where as here, the claim alleges false, fraudulent, unfair and deceptive conduct.

The Court in McKee did not hold that application of Washington law to a major *Washington* corporation would be improper, where as here, the complained of consumer practices were created, implemented and deployed from the corporation's Washington headquarters and all money received from consumers as a result of these practices was received by the corporation in Washington. If anything, this Court's decision in McKee supports application of Washington law in the instant matter based upon the same public policy

considerations relied upon by the trial court in this case in applying the Washington CPA to the claims of all AWS subscribers.[10]

C. Public Policy Considerations Weigh in Favor of Certification.

In his amicus brief, the Attorney General points out the importance of consumer class actions to the effective enforcement of the Washington CPA. Applying an overly restrictive, "one-size-fits-all" causation burden of proof at the class certification stage of the proceedings would doom many meritorious actions, particularly where as here, the trial court's "reliance" test limits the proof of causation to a single jury consideration, i.e. whether the consumer would have chosen a different seller if the amount of the undisclosed mark-up had been disclosed. Under this limited causation standard, it would be virtually impossible for consumers who are cheated out of individually small sums of money when a seller deceptively bills an undisclosed mark-up and masquerades the charge as a "tax" on the consumer, to prove their claims. This result would be inconsistent with the Legislature's directive that the CPA be liberally construed to protect consumers from unfair and deceptive practices.

This Court has previously recognized the strong public policy goals that are served by consumer class actions involving small individual claims. Scott v. Cingular Wireless, 160 Wn.2d 843, 161 P.3d 1000 (2007). The Court noted there, as it did in McKee, the abusive use of contractual provisions in standard form consumer contracts of adhesion to insulate the seller of telecommunication services from any effective recourse by consumers for unfair and deceptive

[10] Again, the argument of *these* Amicus, is particularly disingenuous because they *require* that Washington law apply to the claims of their consumers in their standard form adhesion contracts.

practices that result in small consumer claims. In Scott, this Court saw past Cingular's disingenuous assertions that consumers who were improperly charged individually small sums could obtain effective recourse through Cingular's arbitration procedure that barred all consumer class actions. This Court found that the practical effect of Cingular's provision would be to insulate it from its own wrongdoing. The use of such devices by the wireless industry is widespread, as has been repeatedly acknowledged in decisions involving virtually every major wireless service provider. See, e.g., Lowden v. T-Mobile USA, Inc., 512 F.3d 1213 (9th Cir. 2008).

The brief of the Amici companies, which includes T-Mobile, represents the next "front" in the campaign to eliminate effective scrutiny and recourse for unfair and deceptive sales and billing practices that cause consumers, individually, to pay small sums of money beyond the sales price of the companies calling plan. Wireless service providers generate hundreds of millions of dollars in extra revenue from millions of consumers, by tacking onto the consumer's bill an undisclosed surcharge above the advertised price. It is difficult to think of any other industry that conducts itself in this manner and state attorneys general, including Washington, have found from wireless consumer complaints that:

> At the heart of much consumer confusion is the carriers' practice of incorporating carrier add-on charges as line items to the bills of (wireless) consumers to mask the true price of the services that they provide. Often, when the consumer is first introduced to a (wireless) carrier's service, through representations in carrier promotion or at the point of sale, that carrier states a monthly price for service but fails to clearly state the additional carrier add-on charges, which the carrier knows it will include in

the consumer's monthly bill, and fails to correctly represent those charges as part of the total price.[11]

Class certification of small consumer claims is an essential check on the practices of the wireless industry. The Washington Legislature stated that the purpose of prohibiting unfair and deceptive practices through the CPA was to "to protect the public and foster fair and honest competition." This purpose cannot be achieved if an inflexible *per se* rule of reliance for proving causation places unfair and deceptive billing practices that result in individual small consumer claims beyond the ability of consumers to prove on a class-wide basis. The Plaintiffs in this action have articulated a viable theory of liability and causation that can be proven on a class wide basis for all AWS consumers. Having correctly found that Washington had the most significant relationship to the claims asserted in the action for all AWS subscribers nationwide, the trial court erred in refusing to certify the action based upon an unwarranted and restrictive view of causation and the proof necessary to establish that AWS' sales and billing practices caused its subscribers injury.

III. CONCLUSION

For the foregoing reasons Plaintiffs urge the court to uphold the ruling of the Court of Appeals.

RESPECTFULLY SUBMITTED this 23rd day of October, 2008.

By:s/David E. Breskin
David Breskin, WSBA 10607

[11] See, "Comments of Attorneys General of the Undersigned States", FCC CC Docket No. 98-170 (June 24, 2005), at pg. 3, **Appendix F**. Plaintiffs' request that the Court take judicial notice of this FCC filing by the state attorneys general for 49 of the 50 states, including Washington Attorney General, Rob McKenna. ER 201.

CERTIFICATE OF SERVICE

I hereby certify that on October 23rd, 2007, I electronically filed the foregoing to the Clerk of the Washington Supreme Court (supreme@courts.wa.gov) using their e-mail system and copied the following:

Michael Kipling

kipling@kiplinglawgroup.com

cannon@kiplinglawgroup.com

Stephen M. Rummage

steverummage@dwt.com

By: A. Siefer
Amber R. Siefer
Legal Assistant

APPENDIX A


Next Generation Service
Multi-Band Calling Plans
expanded
voice coverage.
text messaging.
e-mail and more
Northern California
AT&T Wireless

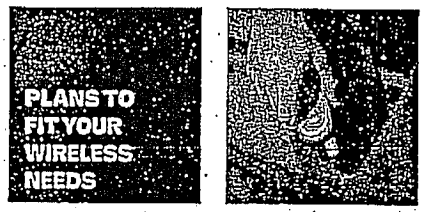
IT'S THE NEXT GENERATION.

With advanced technology, you'll get connected to the people and information that matter to you. It's your speedway to the wireless Web and more!

- Make and receive high-quality voice calls.
- Enjoy a data connection that's always-on, with call notification that alerts you to incoming calls, even when you're in data mode.
- Manage your life in detail with mMode.
- Send and receive e-mail.

It's fast, simple and a great way to stay connected on the go.

HOW DO YOU SELECT JUST WHAT'S RIGHT FOR YOU? IT'S EASY!



When you're looking for a wireless plan, ask yourself a few questions. How often will I be calling? Who am I calling? How long are my phone calls? Once you can answer these questions, you're ready. Just choose the coverage and usage plan you'll need from the following:

- **AT&T WIRELESS MULTI-BAND EXPANDED LOCAL**
  Staying near home? If you plan to use your Multi-Band phone mostly in and around your local calling area, this plan is right for you.
- **AT&T WIRELESS MULTI-BAND NATIONAL NETWORK**
  Do your friends and family live in major cities? If they do, you need the coast-to-coast major city coverage offered by our National Network Plan.
- **AT&T WIRELESS MULTI-BAND ONE RATE**
  Looking for the freedom to call all over the United States at one rate with no domestic roaming or long distance charges? The One Rate Plan can meet your wireless needs.

Voice Mail.
Receive messages when you're on another call or when your phone is turned off. A Message Waiting Indicator will show that messages have been received. Usage charges apply when accessing voice mail from your Multi-Band phone.

AT&T Caller ID.
This feature allows you to see the phone number of a caller before you answer.

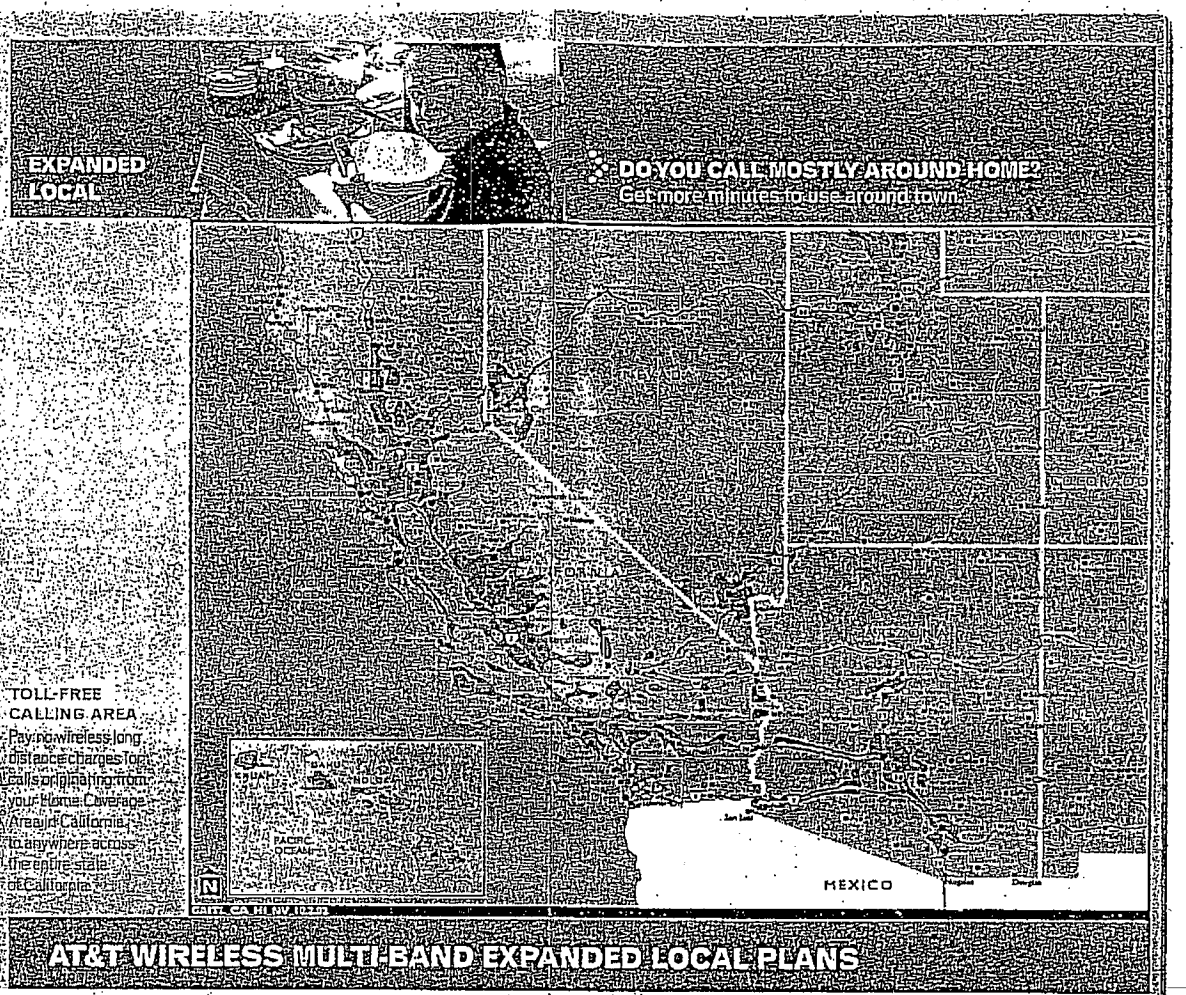
Call Waiting.
With Call Waiting, you can receive incoming calls while an original call is in progress. Airtime, roaming, plus applicable long distance will be charged for both calls.

AT&T Wireless Connect®–411.
When you're mobile, it's nice to know there's a convenient way to get almost any phone number you need—right away. Obtain Directory Assistance and much more for $1.25 per call. Airtime or roaming, plus applicable long distance charges apply.

#121 VoiceInfo.
Dial #121 to get current information you want, where and when you need it. Now you can request and hear driving directions, stock quotes, movie listings, sports scores, weather and news over your wireless phone. You can even customize your favorites.

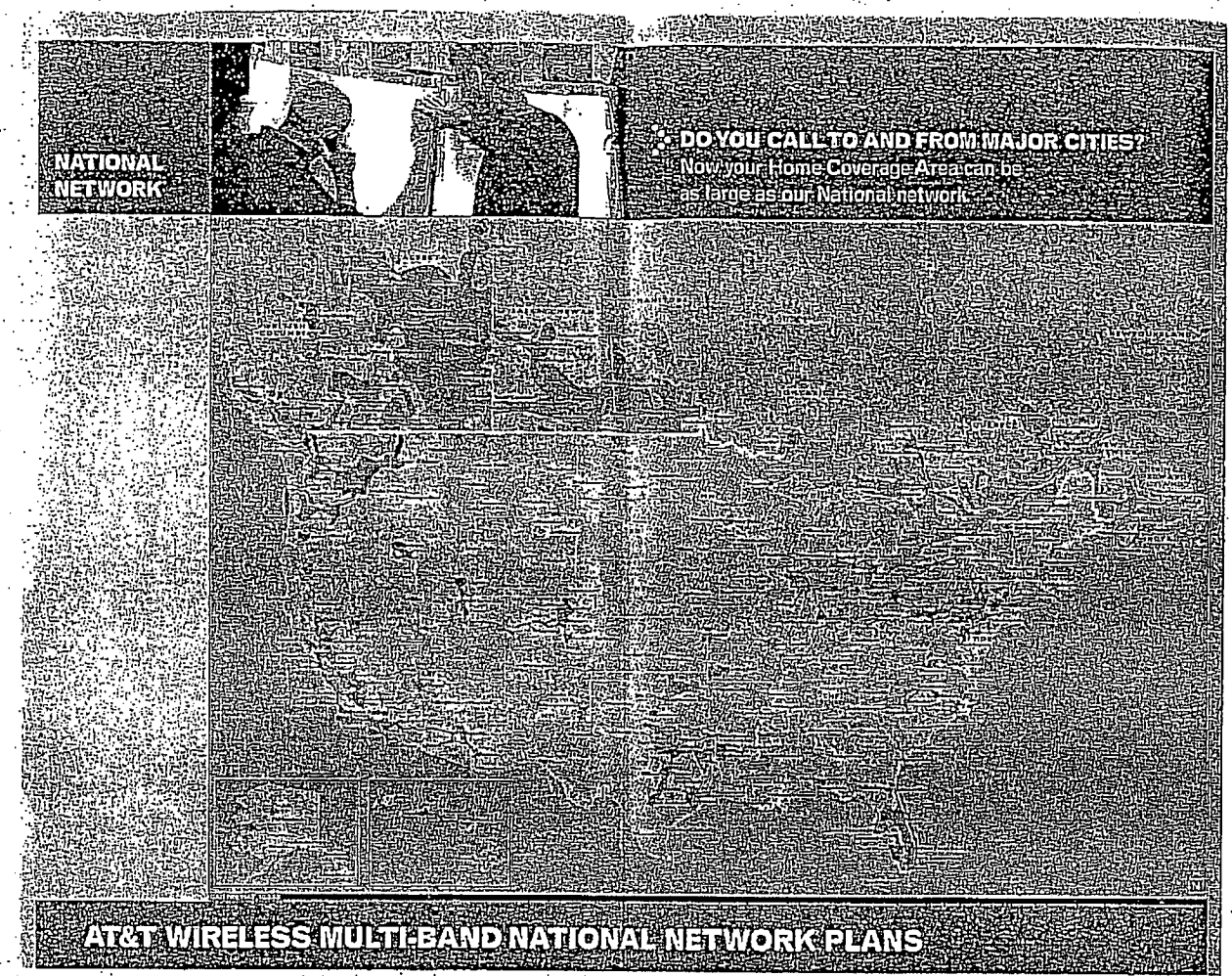
Text Messaging.
Automatically receive unlimited text messages. Also, send and reply to short messages directly to a compatible phone using a 10-digit wireless number, or any Internet e-mail address. Charges are 10¢ for each message sent while on the AT&T Wireless GSM™/GPRS network and 25¢ while traveling in the U.S. or Canada, on other carriers' GSM/GPRS networks. While traveling internationally, outside of Canada, charges are 50¢ per message sent, where available. Choose 100 mobile-originated text messages from the AT&T Wireless GSM/GPRS network for just $4.99 per month.

AT&T Wireless Connect®–411 is not available in Alaska. Basic directory assistance is available in Alaska on the AT&T Wireless network for $1.25 per use, plus airtime, roaming and applicable long distance charges.



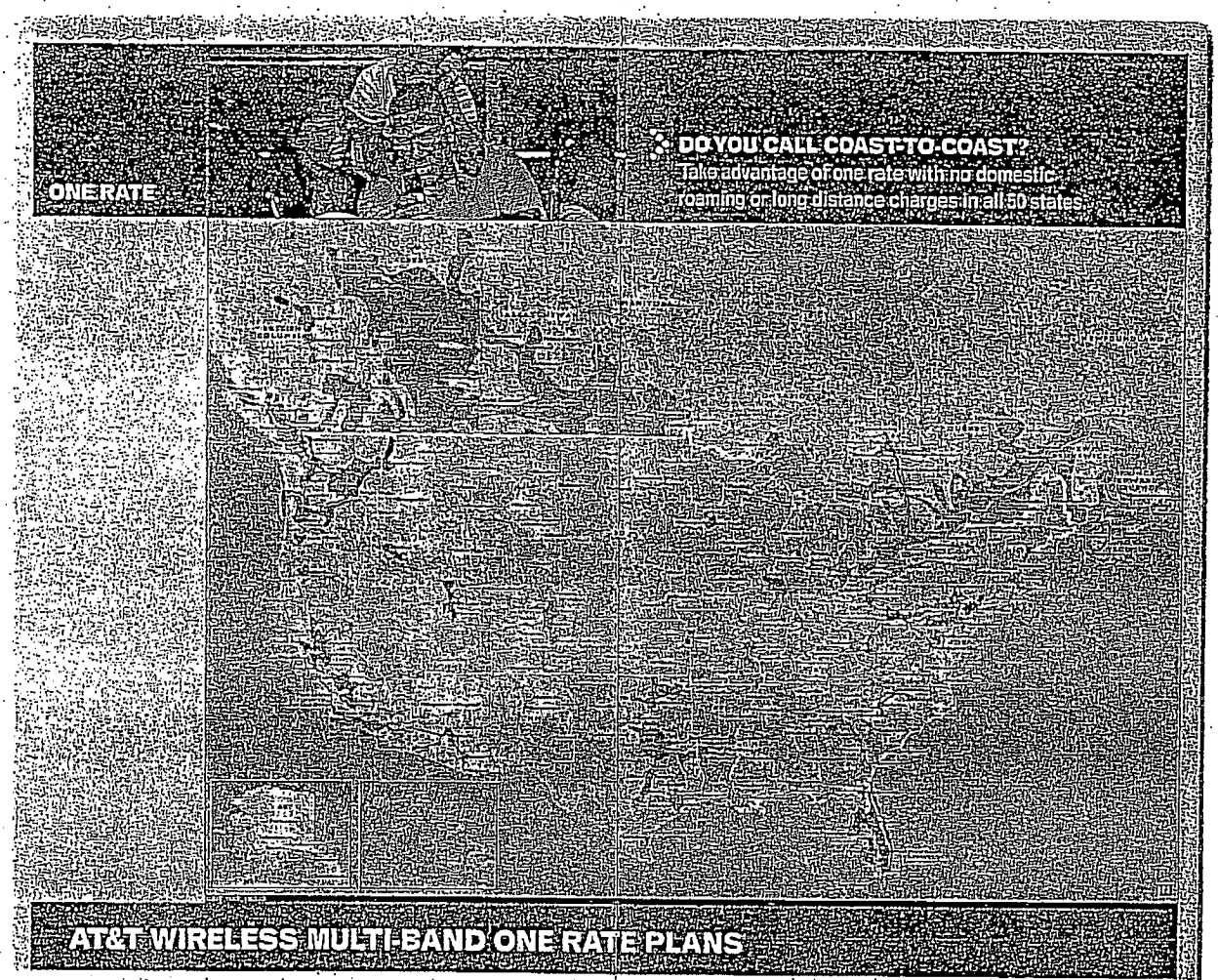
AT&T WIRELESS MULTI-BAND EXPANDED LOCAL PLANS

Monthly Service Charge	Included Voice Minutes	Additional Airtime Per Minute in Your Home Coverage Area	Domestic Wireless Voice Long Distance	Voice Roaming in the U.S. or Canada
$29.99	up to 250	40¢	20¢ per minute	69¢ per minute, plus applicable long distance. Applies outside Home Coverage Area in U.S., in U.S. Territories, and in Canada.
$39.99	up to 400	40¢		
$49.99	up to 600	35¢		
$69.99	up to 800	35¢		
$99.99	up to 1200	30¢		
$149.99	up to 2000	30¢		
$199.99	up to 3000	25¢		



AT&T WIRELESS MULTI-BAND NATIONAL NETWORK PLANS

Monthly Service Charge	Included Voice Minutes	Additional Airtime Per Minute in Your Home Coverage Area	Domestic Wireless Voice Long Distance	Voice Roaming in the U.S. or Canada
$34.99	up to 300	40¢	Domestic long distance is included while in the AT&T Wireless GSM or TDMA Home Coverage Areas. 20¢ per minute otherwise.	69¢ per minute, plus applicable long distance. Applies off-network in U.S., in U.S. Territories, and in Canada.
$49.99	up to 500	40¢		
$74.99	up to 1000	40¢		
$99.99	up to 1300	40¢		
$149.99	up to 2200	40¢		
$199.99	up to 3200	40¢		



AT&T WIRELESS MULTI-BAND ONE RATE PLANS

Monthly Service Charge	Included Voice Minutes	Additional Airtime Per Minute in Your Home Coverage Area	Domestic Wireless Voice Long Distance	Voice Roaming in the U.S. Territories or Canada
$59.99	up to 450	35¢		
$79.99	up to 650	35¢		
$99.99	up to 900	25¢	Long Distance is included when calling from the 50 United States to anywhere in the 50 United States.	Voice roaming in the U.S. is included. 69¢ per minute, plus applicable long distance applies in U.S. Territories and in Canada.
$119.99	up to 1100	25¢		
$149.99	up to 1500	25¢		
$199.99	up to 2000	25¢		

IMPORTANT MAP INFORMATION

HOME AT&T WIRELESS GSM/GPRS COVERAGE AREA

HOME TDMA COVERAGE AREA

ROAMING GSM/GPRS COVERAGE AREA

ROAMING TDMA COVERAGE AREA

COVERAGE NOT AVAILABLE

PERSONAL INFORMATION MADE PORTABLE

Keep your important phone numbers with you, even when you change phones. Our latest technology allows you to store important names and phone numbers you collect over time, your own wireless number, account information and phone settings, all on a removable SIM card. So, if you decide to buy a new phone or just swap phones, simply place your personal SIM card into another compatible phone, and your information is transferred instantly. No more wasted time re-entering information into each phone!

EXPLANATION OF RATES AND CHARGES

Activation subject to credit approval; deposit may be required. Compatible Multi-Band device and minimum one-year contract required. Multi-band rate plans are only available with Multi-Band phones. Your device has been manufactured to operate exclusively on our network, will only accept a SIM card provided by us and cannot be activated with any other wireless carrier. You cannot use your Multi-Band phone with another customer's SIM card. You must be within an AT&T Wireless GSM/GPRS network to activate service. After the first 30 days of service, an early cancellation fee of $175 applies. On the AT&T Wireless GSM/GPRS network, usage is measured during the time you are connected to our system, which is approximately from the time you press the button that initiates or answers the call until approximately the time the first party terminates the call. On the AT&T Wireless TDMA network, usage is measured during the time you are connected to our system, which is approximately from the time you press the button that initiates or answers the call until approximately the time you press the button that terminates the call. Voice usage for each call is billed in full minute increments with partial minutes rounded up to the next full minute. While on the AT&T Wireless network, there is no charge for busy or unanswered calls if you end the call within 30 seconds. Unused monthly included minutes, megabytes and text messages are lost. Availability, timeliness and reliability of service are subject to radio transmission limitations caused by system capacity, system repairs and modifications, your equipment, terrain, signal strength, weather and other conditions.

Included minutes apply to calls placed and received in your Home Coverage Area. Roaming charges apply to calls placed and received outside this area. Roaming not available on other carriers domestic GSM/GPRS networks or any analog network. Different rates apply for calling card or credit card calls or operator assistance. Long distance charges for calls received while roaming are calculated from your home area code to the location where you received the call. Due to delayed reporting between carriers, usage may be billed in a subsequent month and will be charged as if used in the month billed.

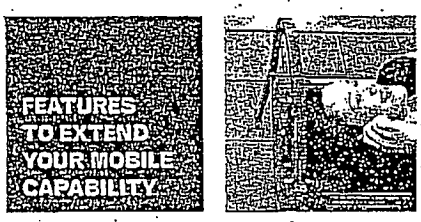
Not all features, service options or offers are available on all devices, on all rate plans or available for purchase or use in all areas. Additional hardware, software, subscription and credit or debit card may be required. You will automatically receive limited access to AT&T Wireless data service for $0.03 per kilobyte on any domestic GPRS network.

You will be charged for all data usage sent through our network, including any advertisements which appear on your device, regardless of actual receipt. Compression may impact the total amount billed to your account. You will be billed for data packets that may be resent. Once every 24 hours our system will create a billing record for each network you use during that period. The usage for each billing record will be rounded up to the next kilobyte and a cost will be associated with each billing record and rounded to the nearest cent. 1024 kilobytes equal one megabyte. Roaming rates apply when downloading or sending data outside of our domestic network. You will not receive call notification when actively sending or receiving data. Our systems will assign you a unique subscriber ID in addition to your phone number. Third parties will have access to your subscriber ID, zip code and your phone model when you browse their Web sites. Any information you involuntarily or voluntarily provide third parties is governed by their policies. For the AT&T Wireless Multi-Band One Rate plans, the end-user's principal residence must be within an eligible AT&T Wireless digital network area. For business or corporate responsibility customers, the end-user's principal residence or principal business office must be within an eligible AT&T Wireless digital network area. (Please ask your Sales Representative for address verification.) Eligibility requirements, pricing, features and calling areas are subject to change without notice. Service is subject to the Terms and Conditions available at attwireless.com/welcomeguide/terms, in the Quick Start Guide included with your phone, and/or available at point-of-purchase.

Fees: Activation – $36 per line; Reconnection – $25 per line; Returned Check Charge – will not exceed $20; Directory Assistance – $1.25 per call plus airtime, roaming and long distance. Other charges, surcharges, assessments, universal connectivity charge, and federal, state and local taxes apply.

(Continued on back panel)

NAT02-2373



A combination of proven voice features and data services that can help you stay productive, giving you a competitive edge.

FEATURES AVAILABLE UPON REQUEST AT NO MONTHLY CHARGE:

Call Forwarding. Sends incoming calls to a designated number. Call Forwarding minutes on the AT&T Wireless Multi-Band plans are billed at the same per minute rate as the plan's additional airtime per minute rate, plus applicable wireless long distance charges.

Three-Way Calling. Allows you to conduct a call with two parties at the same time. Airtime, roaming, plus applicable long distance will be charged for both calls. In order to establish an outgoing international call as part of a three-way conference call, the customer will need to have one of the International Dialing or International Roaming features on their AT&T Wireless account.

International Voice and Data Roaming. International voice and data roaming are available on international carriers' GSM/GPRS networks or TDMA digital voice networks, including many in Europe, Asia and the Americas. Check our Web site often at attwireless.com/mobileinternet/international, as new countries and carriers are continuously being added. With AT&T Wireless International Roaming, you also receive direct dialing from the AT&T Wireless network in the U.S. to over 220 countries at low international long distance rates. Refer to our Web site for details. Not available on all phone models.

International Dialing. International dialing is an easy, convenient way to make international calls from the U.S., on the AT&T Wireless GSM/GPRS network. You only pay for the minutes you use at AT&T basic international long distance rates. For more information, go to attwireless.com/mobileinternet/international

ENHANCED FEATURES AVAILABLE UPON REQUEST WITH A MONTHLY CHARGE:

Night and Weekend Airtime Packages. Add additional airtime minutes for night and weekend calls placed from your Home Coverage Area. Night and weekend airtime minutes are just $4.99 for up to 500 minutes and $9.99 per month for up to 1000 minutes.

Six-Way Calling. Conduct a conference call with up to five other parties on the line. Airtime, roaming, plus applicable long distance will be charged for each call. A $2.99 monthly service charge applies. In order to establish an outgoing international call as part of a six-way conference call, the customer will need to have one of the International Dialing or International Roaming features on their AT&T Wireless account. This feature is available only while on the GSM network.

Discounted International Dialing. Direct dialing available to over 220 countries at low international long distance rates—ranging from 25¢ to 95¢ per minute, based on the international geographic zone being called, plus applicable airtime and roaming charges. These discounted long distance rates are available while on the AT&T Wireless network. For rate information, go to attwireless.com/mobileinternet/international. A $5.99 monthly service charge applies.

AT&T Wireless Toll-Free Nationwide. Eliminates domestic long distance charges for calls from your Home Coverage Area. AT&T Wireless Toll-Free Nationwide is included with the AT&T Wireless Multi-Band One Rate and AT&T Wireless Multi-Band National Network Plans. Additional monthly service charge of $4.99 applies on the AT&T Wireless Multi-Band Expanded Local Plans. This feature is not available on the AT&T Wireless Multi-Band Expanded Local Plan $29.99.

ADDITIONAL INFORMATION ON VOICE ACCESSED INFORMATION: Only available in AT&T Wireless network areas. While your requests are processed, advertisements we think will be of interest to you will be played. You cannot choose to use the service without hearing advertisements. Your phone number will be shared with TellMe Networks to personalize your service. For complete details, say "Legal Disclaimer" from the Main Menu.

ADDITIONAL INFORMATION ON TEXT MESSAGING SERVICE: You can only send short text messages in select geographic areas. You will be billed for each text message sent from your device, whether the message is delivered or not. There is no guarantee of actual delivery or delivery within a specific period of time. See attwireless.com/mobileinternet for complete details.

ADDITIONAL INFORMATION ON NIGHT AND WEEKEND MINUTES: Night and Weekend minutes available on calls placed from the Home Coverage Area and is from 9:00 pm - 5:59 am M - F, and F 9:00 pm - to M 5:59 am; plus New Year's Day, Independence Day, Labor Day, Thanksgiving and Christmas in your Home Coverage Area. Long distance charges may apply.

mMode

CONNECT [illegible]

MANAGE [illegible]

ENTERTAIN [illegible]

LOCATION SERVICES

Location Services give you the lowdown and details on important places and things. You can even locate your friends and family (with their permission) who also have mMode service. Find what you need with mMode.

IMAGING & PERSONALIZATION

Customize your compatible phone with graphics and pictures as background images. Use mMode Pix to take, send and store photos, share them on your phone, even identify callers. Available with the Sony Ericsson T68i and CommuniCam mobile camera.

E-MAIL

Manage your personal e-mail without being at your computer. With access to mMode Mail, plus lots of other e-mail providers, there's no reason to miss an e-mail or to lose touch.

ALERTS

Get up-to-the-minute information on what you need, when you need it most. Want a flight schedule? Need financial updates? With mMode, stay informed while on the go.

HOW WILL YOU USE IT?

[illegible]

For detailed information on the mMode plan that's right for you, please refer to the mMode brochure.

attwireless.com/mMode

LOG ON NOW OR CALL 1 888 MY mLIFE.

mMode Plans.

Whether you use mMode all day, every day—or just when you're on the go—there's a plan that'll work for you.

ULTRA $19.99

"mMode is my lifeline."

Get maximum megabytes for managing your e-mail and calendar, checking stock quotes, weather, news and more. Get 8 MB per month and $.006 per kilobyte over 8 MB.

Domestic/Canada Off-Network Roaming $.0127 per KB
International Roaming $.0195 per KB

MAX $12.99

"mMode keeps me connected."

Get some e-mail, directions, sports scores, find your friends. You should be covered with 4 MB per month and $.008 per kilobyte over 4 MB.

Domestic/Canada Off-Network Roaming $.0127 per KB
International Roaming $.0195 per KB

MEGA $7.99

"mMode helps me check in."

[illegible]

MINI $2.99

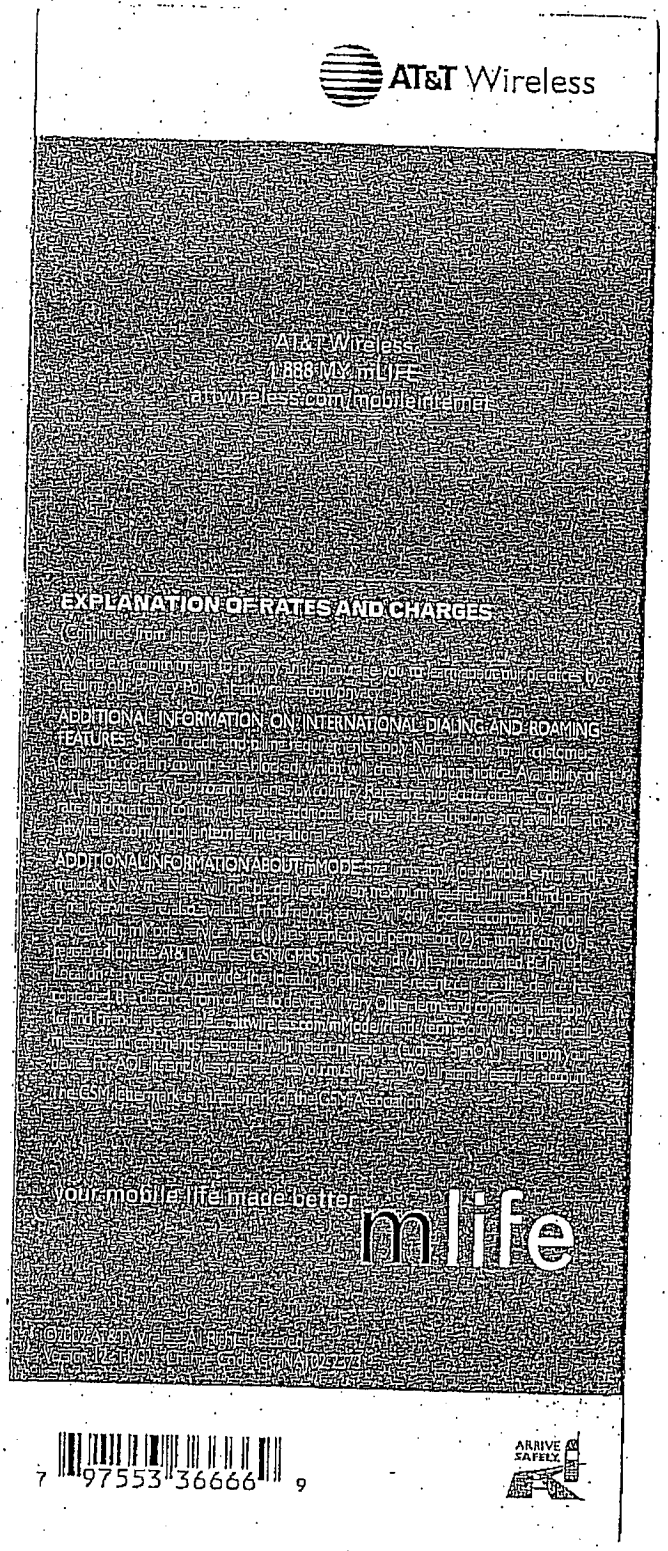
"[illegible] with mMode."

[illegible]

LET US ANALYZE YOUR DATA NEEDS.

Visit attwireless.com/mMode or see your sales representative for assistance.

AGU - SCH 04212



AGU - SCH 04213

APPENDIX B

Help Topics

Search

Digital Products Help
- Amazon Video On Demand
- Amazon MP3 Music Downloads
- Amazon Kindle Wireless Reading Device
- Amazon Software Downloads
- Amazon Podcasts
- Amazon Shorts
- eDocs
- Promotional Videos
- Amazon Upgrade

Shipping & Delivery
- U.S. Shipping Rates and Times
- International Shipping
- Amazon Prime
- Guaranteed Accelerated Delivery
- FREE Super Saver Shipping
- Shipping Restrictions
- Calculating Delivery Dates
- Tracking Packages
- Where's My Stuff?
- Amazon and the Environment

» *More...*

Digital Products Help
- Amazon Video On Demand
- Amazon MP3 Music Downloads
- Amazon Kindle Wireless Reading Device
- Amazon Software Downloads

» *More...*

Privacy, Security & Accessibility
- A-to-Z Guarantee Protection

Amazon Kindle: License Agreement and Terms of Use

THIS IS AN AGREEMENT BETWEEN YOU AND AMAZON DIGITAL SERVICES, INC. (WITH ITS AFFILIATES, "AMAZON" OR "WE"). PLEASE READ THIS LICENSE AGREEMENT AND TERMS OF USE, AND ALL RULES AND POLICIES FOR THE KINDLE DEVICE AND SERVICES RELATED TO THE DEVICE (INCLUDING, BUT NOT LIMITED TO, ANY RULES OR USAGE PROVISIONS SPECIFIED ON THE AMAZON.COM WEBSITE OR THE KINDLE STORE, AND THE AMAZON.COM PRIVACY NOTICE LOCATED AT WWW.AMAZON.COM/PRIVACY) (COLLECTIVELY, THIS "AGREEMENT") BEFORE USING THE KINDLE DEVICE. BY USING THE KINDLE DEVICE, YOU AGREE TO BE BOUND BY THE TERMS OF THIS AGREEMENT.

IF YOU DO NOT ACCEPT THE TERMS OF THIS AGREEMENT, YOU MAY RETURN THE KINDLE DEVICE AND ASSOCIATED SOFTWARE (WITH ALL ORIGINAL PACKAGING) WITHIN THIRTY (30) DAYS OF PURCHASE FOR A REFUND OF ITS PURCHASE PRICE IN ACCORDANCE WITH THE KINDLE RETURN POLICY.

The Device and Related Services

The Kindle Device (the "Device") is a portable electronic reading device that utilizes wireless connectivity to enable users to shop for, download, browse, and read books, newspapers, magazines, blogs, and other materials, all subject to the terms and conditions of this Agreement. The "Service" means the wireless connectivity, provision of digital content, software and support, and other services and support that Amazon provides Device users.

Wireless Connectivity

General. Amazon provides wireless connectivity free of charge to you for certain content shopping and acquisition services on your Device. You will be charged a fee for wireless connectivity for your use of

Self-Service Tools

Most Popular
- Track or Manage Purchases
- Manage Payment Options
- Return Items
- Change Name, E-mail, or Password
- Manage Address Book

Account Profile
Billing & Addresses
Ordering Settings
Lists
Your Content
Sign Out of Amazon.com

Get Express customer service or contact us by e-mail or phone.

Contact Us

Digital Downloads Help

amazonmp3 GO
amazon video on demand GO
amazonkindle GO

Did this info help?
- Yes, I found the information I needed
- No, I wasn't able to find the information I needed

- Identifying Phishing E-Mails
- Safety & Security Tips
- Credit Card Security
- Privacy Notice
- » *More...*

Returns & Replacements
- Return Policy
- Refunds
- Gift Returns
- Exchanging a Broken or Incorrect Item
- Packing and Sending Your Return
- Returns to Amazon Merchants
- » *More...*

Ordering on Amazon.com
- New Customers
- Amazon Merchants
- 1-Click Ordering
- Product Recalls
- Warranties
- » *More...*

Viewing & Changing Orders
- Problem with an Order?
- Changing Address or Payment for an Order
- Canceling Orders
- Combining Orders
- » *More...*

Payment, Pricing & Promotions
- Payment Methods We Accept
- Gift Cards
- Rebates
- Promotional Offers
- » *More...*

Gifts, Gift Cards & Gift Registries
- Sending Gifts
- Wish Lists
- Baby Registry
- Gift Cards
- » *More...*

Updating Account Information
- Using Your Account
- Updating Payment Information
- Adding or Deleting Addresses
- Changing E-Mail Address or Password
- Updating Subscriptions
- » *More...*

other wireless services on your Device, such as Web browsing and downloading of personal files, should you elect to use those services. We will maintain a list of current fees for such services in the Kindle Store. Amazon reserves the right to discontinue wireless connectivity at any time or to otherwise change the terms for wireless connectivity at any time, including, but not limited to, (a) limiting the number and size of data files that may be transferred using wireless connectivity and (b) changing the amount and terms applicable for wireless connectivity charges.

Coverage; Service Interruptions. You acknowledge that if your Device is located in any area without applicable wireless connectivity, you may not be able to use some or all elements of the wireless services.We are not responsible for the unavailability of wireless service or any interruptions of wireless connectivity.

Your Conduct. You agree you will use the wireless connectivity provided by Amazon only in connection with Services Amazon provides for the Device. You may not use the wireless connectivity for any other purpose.

Digital Content

The Kindle Store. The Kindle Store enables you to download, display and use on your Device a variety of digitized electronic content, such as books, subscriptions to magazines, newspapers, journals and other periodicals, blogs, RSS feeds, and other digital content, as determined by Amazon from time to time (individually and collectively, "Digital Content").

Use of Digital Content. Upon your payment of the applicable fees set by Amazon, Amazon grants you the non-exclusive right to keep a permanent copy of the applicable Digital Content and to view, use, and display such Digital Content an unlimited number of times, solely on the Device or as authorized by Amazon as part of the Service and solely for your personal, non-commercial use. Digital Content will be deemed licensed to you by Amazon under this Agreement unless otherwise expressly provided by Amazon.

Restrictions. Unless specifically indicated otherwise, you may not sell, rent, lease, distribute, broadcast, sublicense or otherwise assign any rights to the Digital Content or any portion of it to any third party, and you may not remove any proprietary notices or labels on the Digital Content. In addition, you may not, and you will not encourage, assist or authorize any other person to, bypass, modify, defeat or circumvent security features that protect the Digital Content.

Amazon.com Site Features
- Your Content
- Advanced Shopping Features
- Your Media Library
- RSS Feeds
- More...

Selling at Amazon.com
- Introduction to Selling
- Quick Start Guide
- Seller Account and Settings
- Policies and Agreements
- More...

Publisher & Vendor Guides
- List and Sell Books
- List and Sell DVDs
- On-Demand Publishing
- More...

Business Opportunities
- Advantage
- Associates
- Web Services
- Mechanical Turk
- WebStore by Amazon
- More...

Subscriptions. The following applies with respect to Digital Content made available to you on a subscription basis, including, but not limited to, electronic newspapers, magazines, journals and other periodicals (collectively, "Periodicals"): (i) you may request cancellation of your subscription by following the cancellation instructions in the Kindle Store; (ii) we may terminate a subscription at our discretion without notice, for example, if a Periodical is no longer available; (iii) if we terminate a subscription in advance of the end of its term, we will give you a prorated refund; (iv) we reserve the right to change subscription terms and fees from time to time, effective as of the beginning of the next term; and (v) taxes may apply to subscription fees and will be added if applicable.

Software

Definitions. The following terms apply to the Device and to (a) all software (and the media on which such software is distributed) of Amazon or third parties that is pre-installed on the Device at time of purchase or that Amazon provides as updates/upgrades to the pre-installed software (collectively, the "Device Software"), unless you agree to other terms as part of an update/upgrade process; and (b) any printed, on-line or other electronic documentation for such software (the "Documentation"). As used in this Agreement, "Software" means, collectively, the Device Software and Documentation.

Use of the Device Software. Software. You may use the Device Software only on the Device. You may not separate any individual component of the Device Software for use on another device or computer, may not transfer it for use on another device or use it, or any portion of it, over a network and may not sell, rent, lease, lend, distribute or sublicense or otherwise assign any rights to the Software in whole or in part.

No Reverse Engineering, Decompilation, Disassembly or Circumvention. You may not, and you will not encourage, assist or authorize any other person to, modify, reverse engineer, decompile or disassemble the Device or the Software, whether in whole or in part, create any derivative works from or of the Software, or bypass, modify, defeat or tamper with or circumvent any of the functions or protections of the Device or Software or any mechanisms operatively linked to the Software, including, but not limited to, augmenting or substituting any digital rights management functionality of the Device or Software.

Automatic Updates. In order to keep your Software up-to-date, Amazon may automatically provide your Device with updates/upgrades to the Software.

Export Regulations. You agree to comply with all export and re-export restrictions and regulations of the Department of Commerce and other United States agencies and authorities, and not to transfer, or encourage, assist or authorize the transfer of the Software to a prohibited country or otherwise in violation of any such restrictions or regulations.

Government End Users. The Software is a "Commercial item" as that term is defined at 48 C.F.R. §.2.101, consisting of "Commercial Computer Software" and "Commercial Computer Software Documentation," as such terms are used in 48 C.F.R. § 12.212 or 48 C.F.R. § 227.7202, as applicable. Consistent with these provisions, the Software is being licensed to U.S. Government end users (a) only as a Commercial item and (b) with only those rights as are granted to all other end users pursuant to the terms and conditions of this Agreement.

General

No Illegal Use and Reservation of Rights. You may not use the Device, the Service or the Digital Content for any illegal purpose. You acknowledge that the sale of the Device to you does not transfer to you title to or ownership of any intellectual property rights of Amazon or its suppliers. All of the Software is licensed, not sold, and such license is non-exclusive.

Information Received. The Device Software will provide Amazon with data about your Device and its interaction with the Service (such as available memory, up-time, log files and signal strength) and information related to the content on your Device and your use of it (such as automatic bookmarking of the last page read and content deletions from the Device). Annotations, bookmarks, notes, highlights, or similar markings you make in your Device are backed up through the Service. Information we receive is subject to the Amazon.com Privacy Notice.

Patents and Trademarks. The Device and/or methods used in association with the Device may be covered by one or more patents or pending patent applications. AMAZON, AMAZON.COM, KINDLE, WHISPERNET, MOBIPOCKET and the AMAZONKINDLE logo are trademarks or registered trademarks of Amazon Technologies, Inc. or its affiliates.

Changes to Service. Amazon reserves the right to modify, suspend, or discontinue the Service at any time, and Amazon will not be liable to you should it exercise such right.

Termination. Your rights under this Agreement will automatically terminate without notice from Amazon if you fail to comply with any term of this Agreement.

In case of such termination, you must cease all use of the Software and Amazon may immediately revoke your access to the Service or to Digital Content without notice to you and without refund of any fees. Amazon's failure to insist upon or enforce your strict compliance with this Agreement will not constitute a waiver of any of its rights.

Disclaimer of Warranties. YOU EXPRESSLY ACKNOWLEDGE AND AGREE THAT USE OF THE SERVICE, DEVICE, DIGITAL CONTENT AND SOFTWARE IS AT YOUR SOLE RISK. EXCEPT FOR THE ONE-YEAR LIMITED WARRANTY, THE SERVICE, DEVICE, DIGITAL CONTENT AND SOFTWARE ARE PROVIDED "AS IS" WITH ALL FAULTS AND WITHOUT WARRANTY OF ANY KIND AND AMAZON DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, ACCURACY, QUIET ENJOYMENT AND NON-INFRINGEMENT OF THIRD-PARTY RIGHTS. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY AMAZON OR AN AUTHORIZED REPRESENTATIVE OF AMAZON SHALL CREATE AWARRANTY. THE LAWS OF CERTAIN JURISDICTIONS DO NOT ALLOWTHE DISCLAIMER OF IMPLIEDWARRANTIES. IF THESE LAWS APPLY TO YOU, SOME OR ALL OF THE ABOVE DISCLAIMERS, EXCLUSIONS OR LIMITATIONS MAY NOT APPLY TO YOU, AND YOU MAY HAVE ADDITIONAL RIGHTS.

Limitation of Liability. TO THE EXTENT NOT PROHIBITED BY LAW, AMAZON SHALL NOT BE LIABLE FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES FOR BREACH OF ANY EXPRESS OR IMPLIED WARRANTY, BREACH OF CONTRACT, NEGLIGENCE, STRICT LIABILITY OR ANY OTHER LEGAL THEORY RELATED TOTHE SERVICE, DEVICE, DIGITAL CONTENT OR SOFTWARE, INCLUDING, BUT NOT LIMITED TO, ANY DAMAGES ARISING OUT OF LOSS OF PROFITS, REVENUE, DATA OR USE OF THE DEVICE OR SOFTWARE OR ANY ASSOCIATED PRODUCT, EVEN IF AMAZON HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN ANY CASE, AMAZON'S AGGREGATE LIABILITY UNDER THIS AGREEMENT SHALL BE LIMITED TOTHE AMOUNT ACTUALLY PAID FOR THE DEVICE. THE LAWS OF CERTAIN JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES. IF THESE LAWS APPLY TOYOU, SOME OR ALL OF THE ABOVE EXCLUSIONS OR LIMITATIONS MAY NOT APPLY TO YOU, AND YOU MAY HAVE ADDITIONAL RIGHTS.

Washington Law Applies. The laws of the state of Washington, without regard to principles of conflict of laws, will govern this Agreement and any dispute of any sort that might arise between you and Amazon.

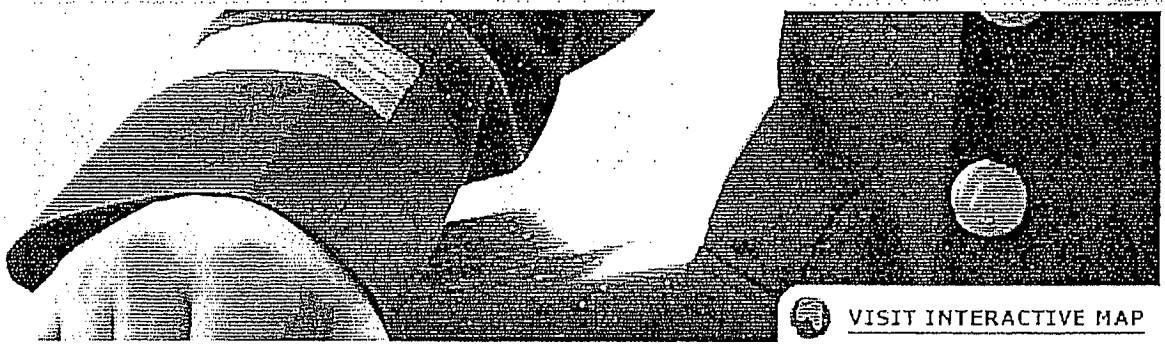
Disputes. ANY DISPUTE ARISING OUT OF OR RELATING IN ANYWAY TOTHIS AGREEMENT SHALL BE SUBMITTED TO CONFIDENTIAL ARBITRATION IN SEATTLE,WASHINGTON, EXCEPT THAT, TO THE EXTENT YOU HAVE IN ANY MANNER VIOLATED OR THREATENED TO VIOLATE AMAZON'S INTELLECTUAL PROPERTY RIGHTS, AMAZON MAY SEEK INJUNCTIVE OR OTHER APPROPRIATE RELIEF IN ANY STATE OR FEDERAL COURT IN THE STATE OFWASHINGTON, AND YOU CONSENT TO EXCLUSIVE JURISDICTION AND VENUE IN SUCH COURTS. The arbitrator's award shall be binding and may be entered as a judgment in any court of competent jurisdiction. To the fullest extent permitted by applicable law, no arbitration under this Agreement shall be joined to an arbitration involving any other party subject to this Agreement, whether through class arbitration proceedings or otherwise.

Severability. If any term or condition of this Agreement shall be deemed invalid, void, or for any reason unenforceable, that part shall be deemed severable and shall not affect the validity and enforceability of any remaining term or condition.

Amendment. Amazon reserves the right to amend any of the terms of this Agreement at its sole discretion by posting the revised terms on the Kindle Store or the Amazon.com website. Your continued use of the Device and Software after the effective date of any such amendment shall be deemed your agreement to be bound by such amendment.

Contact Information. For communications concerning this Agreement, you may contact Amazon by writing to Amazon.com, Attn: Legal Department, 1200 12th Avenue South, Suite 1200, Seattle,WA, 98144-2734.

APPENDIX C



LEGAL & PRIVACY

HOLLAND AMERICA LINE

300 Elliott Avenue West

Seattle, WA 98119

ISSUED SUBJECT TO THE IMPORTANT TERMS AND CONDITIONS ON THIS PAGE AND THE FOLLOWING PAGES. READ TERMS AND CONDITIONS CAREFULLY.

IMPORTANT NOTICE TO PASSENGERS:

THIS DOCUMENT IS A LEGALLY BINDING CONTRACT BETWEEN YOU AND US. THIS CONTRACT CONTAINS ALL TERMS OF OUR AGREEMENT AND SUPERCEDES ALL OTHER ORAL OR WRITTEN AGREEMENTS, COMMUNICATIONS OR REPRESENTATIONS. THE WORD "YOU" REFERS TO ALL PERSONS TRAVELING UNDER THIS CONTRACT INCLUDING THEIR HEIRS, SUCCESSORS IN INTEREST AND PERSONAL REPRESENTATIVES. THE WORDS "WE" AND "US" REFER TO THE OWNER, HAL AND THE OTHER HAL COMPANIES, ALL OF WHICH ARE DESCRIBED IN CLAUSE A.1 BELOW. CERTAIN OTHER PERSONS AND ENTITIES, AS WELL AS THE SHIP ITSELF, ARE ALSO GRANTED RIGHTS UNDER THIS CONTRACT.

NOTICE: YOUR ATTENTION IS ESPECIALLY DIRECTED TO CLAUSES A.1, A.3, A.4, A.5, A.6, A.7, A.9 and C.4 BELOW, WHICH CONTAIN IMPORTANT LIMITATIONS ON YOUR RIGHT TO ASSERT CLAIMS AGAINST US AND CERTAIN THIRD PARTIES.

THIS CONTRACT ALSO INCLUDES THE CONDITIONS UNDER WHICH HAL BOOKS AIR TRANSPORTATION IF YOU ARE PARTICIPATING IN HAL'S FLY CRUISE OR FLY CRUISE AND TOUR PROGRAM. IF ANY OF THESE CONDITIONS DO NOT MEET WITH YOUR APPROVAL, YOU HAVE THE OPTION OF ARRANGING AIR TRANSPORTATION INDEPENDENTLY IN WHICH EVENT THE AIR ADD-ON OR CRUISE ONLY CREDIT AMOUNT PAID TO HAL WILL BE REFUNDED.

ALL DISPUTES AND MATTERS WHATSOEVER ARISING UNDER, IN CONNECTION WITH OR INCIDENT TO THIS CONTRACT, THE CRUISE, THE CRUISETOUR, THE HAL LAND TRIP OR THE HAL AIR PACKAGE SHALL BE LITIGATED, IF AT ALL, IN AND BEFORE THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, OR, AS TO THOSE LAWSUITS AS TO WHICH THE FEDERAL COURTS OF THE UNITED STATES LACK SUBJECT MATTER JURISDICTION, IN THE COURTS OF KING COUNTY, STATE OF WASHINGTON, U.S.A., TO THE EXCLUSION OF ALL OTHER COURTS.

IMPORTANT TERMS AND CONDITIONS OF CONTRACT - READ CAREFULLY BEFORE ACCEPTING.

A. GENERAL PROVISIONS

1. Important Definitions/Refunds/Third Party Beneficiaries: (a) "Ship" refers to the ship that will provide the ocean

transportation portion of the Cruise or Cruisetour. "Owner" refers to the owner and charterer of the Ship; the WESTERDAM, ZUIDERDAM, OOSTERDAM, PRINSENDAM, AMSTERDAM, ZAANDAM, EURODAM, VOLENDAM AND NOORDAM are owned by HAL Antillen N.V., a Netherlands Antilles corporation, and are chartered by Holland America Line N.V., a Netherlands Antilles corporation; the STATENDAM, MAASDAM, RYNDAM, VEENDAM and ROTTERDAM are owned by HAL Nederland N.V., a Netherlands Antilles corporation, and are chartered by Holland America Line N.V. Ship ownership and registry are subject to change. "Cruise" and "Cruisetour" refer to the specific cruise or cruisetour indicated in this booklet, as it may be modified by us under this contract, and shall include periods during which you are embarking or disembarking the Ship or are on shore while the Ship is in port. "HAL" refers to Holland America Line Inc., a Washington (U.S.A.) corporation that acts as the agent of Owner and the other HAL Companies. "HAL Companies" refers to HAL, Westours Motor Coaches, Inc. d/b/a Gray Line of Alaska, Evergreen Trails, Inc. d/b/a Gray Line of Seattle, Westmark Hotels of Canada Ltd., Worldwide Shore Services Inc., HAL Properties Limited and any other corporate affiliate of HAL that provides or is expected to provide you with goods or services as part of or incident to your Cruise, Cruisetour, HAL Air Package or HAL Land Trip. "Initial Departure" means the time at which you first begin transit by any means of transport booked by us (including air transportation) for the purpose of taking the Cruise or Cruisetour. "HAL Air Package" refers to air transportation booked for you by us to enable you to travel to and from your Cruise or Cruisetour. "HAL Land Trip" refers to a pre- or post-Cruise or Cruisetour package or transfer you have purchased (excluding any HAL Air Package), or to a shore excursion you purchase during your Cruise or Cruisetour, on which you are traveling on one or more motorcoaches, dayboats and/or railcars owned or operated by us. "HAL Land Trip" also refers to any visit by you to Half Moon Cay (on the island of Little San Salvador) in the Bahamas ("Half Moon Cay").

(b) "Refund Amount" refers to that portion of the Cruise, Cruisetour, HAL Land Trip or HAL Air Package fare which has actually been received by us. A portion of your fare was retained by or paid to your travel agent to compensate the agent for their services. The Refund Amount does not include the portion of the fare retained by or paid to your agent. You are solely responsible for obtaining the refund of these retained or paid amounts. Any refund to you will be effected only in the currency received by us and in the country in which the fare has been paid and subject to any foreign exchange regulations in force in that country.

(c) Certain third parties derive rights and exemptions from liability as a result of this contract. Specifically, all of our rights, exemptions from liability, defenses and immunities under this contract (including, but not limited to, those arising under Clauses A.3, A.4, A.5, A.6, A.7, A.9 and C.4), the provisions of the forum selection clause, or applicable law will also inure to the benefit of our employees and agents, together with the Alaska Railroad Corporation, the Ship and the Ship's tenders, operators, managers, charterers, officers, staff, crewmembers, shipbuilders and manufacturers of all component parts and all suppliers, shore excursion operators, concessionaires and other independent contractors. These third parties will have no liability to you, either in contract or in tort, which is greater than or different from ours.

2. Providing Cruise, Cruisetour, HAL Land Trips and HAL Air Package: In consideration of the receipt in full of the fare and subject to the terms and conditions of this contract: (a) Owner agrees to transport you on the Ship in order to enable you to take the Ship portion of the Cruise or Cruisetour; (b) as to Cruisetours, HAL agrees to provide you with the portion of the Cruisetour that occurs either before your initial embarkation onto, or after your final disembarkation off of, the Ship; (c) as to HAL Land Trips, each HAL Company furnishing a portion of the HAL Land Trip agrees to provide you with that portion; and (d) as to HAL Air Packages, HAL agrees to book the air transportation required at the commencement and conclusion of your Cruise or Cruisetour. This contract is valid only for the Cruise or Cruisetour and for the cabin specified in this Cruise Contract booklet (or any other cabin assigned by us). Although this contract refers to Owner, HAL and the HAL Companies as "we" and "us," no Owner or HAL Company shall be liable for the acts or omissions of any other Owner or HAL Company or with respect to the services provided or to be provided by any other Owner or HAL Company.

3. Time Limits for Noticing Claims and Filing and Service of Lawsuits: In any case governed by 46 United States Code Section 30508, which is a United States statute that permits any shipowner to limit the time during which a passenger may file a claim or commence suit against a shipowner, you may not maintain a lawsuit against us or the Ship for loss of life or personal injury, including emotional distress, unless written notice of the claim is delivered to us not later than six (6) months after the day of death or injury, the lawsuit is commenced not later than one (1) year after the day of death or injury, and valid service of the lawsuit on Owner, the HAL Company or the Ship, as applicable, is made within thirty (30) days following the expiration of that one-year period. For all other claims, including but not limited to claims for loss or damage to baggage, breach of contract, misrepresentation, illness or death or injury, not governed by 46 United States Code Section 30508, whether based on contract, tort, statutory, constitutional or other legal rights, including but not limited to alleged violation of civil rights, discrimination, consumer or privacy laws, or for any losses, damages or expenses, relating to or in any way arising out of or connected with this contract or your cruise, no matter how described, pleaded or styled, you may not maintain a lawsuit against us or the Ship, nor will we or the Ship be liable therefore, unless we are provided with written notice of claim within thirty (30) days after conclusion of the Cruise or Cruisetour, the lawsuit for such claim is commenced not later than six months after conclusion of the Cruise or Cruisetour, and valid service of the lawsuit on Owner, the Ship or the HAL Company, as applicable, is made within thirty (30) days following the expiration of that six-month period.

In the case of a claim by or on behalf of a minor or legally incompetent person, or in the case of a wrongful death claim, the time periods described above shall begin to run on the earlier of: (a) date of appointment of a legal representative for the minor or legally incompetent person, or their estate (as the case may be); or (b) three (3) years after the day of death, injury or damage, as applicable.

4. Limitation on Liability; Governing Law; Non-HAL Services: (a) In the event you are injured, become ill, or die, or your

property is lost or damaged, or you and/or your property is delayed, or you sustain any other loss or damage whatsoever, we will not be liable to you unless the occurrence was due to our negligence or willful fault. We disclaim liability to you under any circumstances for infliction of emotional distress, mental suffering or psychological injury which was not: (i) the result of physical injury to you caused by the negligence or fault of a crewmember or the manager, agent, master, owner or operator of the Ship; (ii) the result of you having been at actual risk of physical injury caused by the negligence or fault of a crewmember or the manager, agent, master, owner or operator of the Ship; or (iii) intentionally inflicted by a crewmember or the manager, agent, master, owner or operator of the Ship. In no event will we be liable to you for consequential, incidental, exemplary or punitive damages.

(b) This contract is issued at Seattle, Washington. As to any cruise that does not begin, end or call at a port in the United States of America, we shall be entitled to any and all damages limitations, immunities and rights applicable to us under the "Convention Relating to the Carriage of Passengers and Their Luggage by Sea" of 1974 as well as the "Protocol to the Convention Relating to the Carriage of Passengers and Their Luggage by Sea" of 1976 ("Athens Convention"). The Athens Convention limits our liability for death or personal injury of a passenger to no more than 46,666 Special Drawing Rights as defined therein (approximately U.S. $70,000, which fluctuates depending on the daily exchange rate as published in the Wall Street Journal). In addition, and on all other cruises, all the exemptions from and limitations of liability provided in or authorized by the laws of the United States shall apply, including Title 46 of the United States Code, sections 30501 through 30509 and 30511. Except as otherwise set forth, this contract shall be governed by and construed in accordance with the general maritime law of the United States; to the extent such maritime law is not applicable, it shall be governed by and construed in accordance with the laws of the State of Washington (U.S.A.).

(c) We do not undertake to supervise, nor assume any liability in respect of, the acts or omissions of the Ship's barbers, beauticians, masseurs, masseuses or photographers, all of whom are either independent contractors or are employed by independent contractors, and work directly for the passenger when performing their services. As to your Cruisetour and HAL Land Trips, certain transportation will be provided using equipment owned or operated by us. All other transportation, shore excursions, accommodations and services in the air and on shore (referred to as "Non-HAL Services") are performed by third parties who are independent contractors, and not by us. By way of example only, Non-HAL Services include goods and services provided by shoreside physicians, air ambulance, hotels, restaurants, airlines (including the airline(s) used in any HAL Air Package), railroads, tour operators (other than us), helicopter operators, amusement park operators, dayboat operators and motorcoach operators. As a result, you are assuming the entire risk of utilizing Non-HAL Services subject only to whatever terms or arrangements are made by you or on your behalf with the third party furnishing the Non-HAL Service. Money received in respect of Non-HAL Services by us is received only as an independent contractor, to be paid to the third party (less retained commission, if any). We will not be liable for the refund of this money to you except to the extent retained and not owed by us to a third party providing Non-HAL Services. Similarly, any medical examination or treatment you receive from personnel aboard ship during the Cruise, Cruisetour or HAL Land Trip, is provided solely for your convenience by independent contractors rather than our agent or employee. We do not undertake to supervise the medical expertise of any such personnel and will not be liable for the consequences of any examination, advice, diagnosis, medication, treatment, prognosis or other professional services which a doctor or nurse may furnish or fail to furnish to you. Furthermore, you may be charged for such professional services.

(d) You assume all risks for injury, death or loss as a consequence of your use of the Ship's athletic or recreational equipment or as a consequence of criminal conduct by any third party. Except as otherwise specified in Clause A.4(b) with regard to cruises that do not begin, end or call at a port in the United States of America, in addition to the limitations of, and exemptions from, liability granted under this contract, we also retain any and all limitations of, and exemptions from, liability accorded to shipowners and tour operators by statute or rule of law including, without limitation, those provided for in 46 United States Code Sections 30501 through 30509 and 30511, which are United States statutes limiting the liability of vessel owners.

(e) During your Cruise and the Ship portion of your Cruisetour, we are transporting you and your property only between ports of call. At ports where the Ship is unable to dock, we will arrange for appropriate transportation from the place where the Ship is at anchor to the dock. Persons with mobility impairments should refer to the What You Need to Know Before You Go booklet regarding limitations on our ability to help you go ashore.

5. Change in Itinerary/Cancellation: (a) Although we will use our best efforts to provide you with the Cruise, Cruisetour and/or HAL Land Trips, situations may occur which require that changes be made. By way of example only, we may adjust itineraries and schedules, delay departures or arrivals, or cancel a Cruise, Cruisetour or HAL Land Trip, due to casualty, weather, labor problems, the need to render assistance to others, governmental or insurer directives, passenger or employee injury or illness, schedule delays or changes by third parties, repair and maintenance requirements, fuel or other shortages, or damage to the Ship, other means of transportation, roads, tracks, bridges, docks, equipment or machinery. Furthermore, the Master of the Ship or of any other vessel as well as the operator of any other means of transportation may, in his/her sole discretion, elect not to proceed in the ordinary course. Consequently, we cannot guarantee the itinerary of the Cruise, Cruisetour or any HAL Land Trip (including time of sailing from or arrival at any port or that all ports will, in fact, be called at, or that all places on your Cruisetour or HAL Land Trip will be visited). We reserve the right to provide you with alternative transportation whenever the Cruise, Cruisetour or HAL Land Trip is unable to proceed or be completed in the ordinary course or, in the case of hotels, to substitute facilities of similar category in cases where the planned hotel is unavailable due to overbooking or otherwise.

(b) Your safety is very important to us. For safety or other reasons that we believe qualify as good cause, we may, without notice, substitute any suitable ship, ships or other means of transportation, change any date of sailing or travel or cancel any sailing, Cruisetour segment, port of call, Cruisetour or HAL Land Trip destination or stopover, or the entire HAL Land Trip, Cruise or Cruisetour.

(c) If the Cruise or Cruisetour or a HAL Land Trip is cancelled, we may disembark you at any port or terminate your travel at any location, and transship and forward (at our expense, but at your risk) you and your property to or toward a port or location from which you may return home or to the Ship, as appropriate. The means of conveyance may or may not belong to us and may or may not proceed directly to the desired destination. If a Cruise, Cruisetour or HAL Land Trip is cancelled before commencement, you will be entitled, as your exclusive remedy, to receive the applicable Refund Amount. If a Cruise, Cruisetour or HAL Land Trip is cancelled after commencement, you will be entitled, as your exclusive remedy, to receive the applicable Refund Amount less a reasonable allowance for transportation and services already provided to you. The reasonable allowance will be determined on a pro rata basis by taking into account the time missed relative to the scheduled duration of the Cruise, Cruisetour or HAL Land Trip. Notwithstanding the foregoing, we are not obligated to issue any refund to you in the event of a cancelled HAL Land Trip to Half Moon Cay.

(d) You acknowledge that for round trip cruises commencing in the United States that stop in other ports of the United States, you may visit but may not permanently disembark in any U.S. port other than the port of embarkation. If you do disembark in a different U.S. port, a fine or penalty may be imposed by the United States government. In consideration of the fare paid, you hereby agree to pay any such fine or penalty imposed because of your failure to complete the entire cruise.

6. Authority to Remove Passengers: We may reasonably determine that for your safety, the safety of the Ship or other means of transportation or the safety or comfort of other passengers or our employees, you be denied transportation either before or during the Cruise, Cruisetour or HAL Land Trip. By way of example, these would include situations where: (a) you are or become in such condition as to be unfit to travel or dangerous or obnoxious to other passengers or employees; (b) you are inadmissible under the immigration or other laws of any country included in the Cruise, Cruisetour or HAL Land Trip itinerary or fail at any time to possess required travel documents; or (c) you fail to abide by the rules or orders of the Master or other ship's officers. If transportation is denied after departure, you and your baggage may be landed or transported to any port or location that we select, without any resulting liability on our part.

7. Baggage: (a) We will carry as baggage only your personal effects consisting of wearing apparel, toilet articles and similar items for your wearing, comfort or convenience during the Cruise, Cruisetour and HAL Land Trips and not belonging to or intended for use by any other person or for sale. Radioactive materials, controlled substances (other than lawfully obtained prescription drugs), firearms and illicit materials are strictly prohibited. For loading and unloading the Ship and other means of transportation, all baggage must be tendered for carriage in securely constructed and locked suitcases or trunks. All baggage must be able to be both safely stowed in your cabin on the Ship and, for Cruisetours and HAL Land Trips, fit in the baggage compartment of any means of transportation. The only animals permitted to accompany you are qualified service animals for passengers with disabilities; you are responsible for complying with governmental health and other requirements as to service animals.

(b) We are not liable for: (1) any loss, damage or delay before baggage comes into our actual custody at the commencement of your Cruise, Cruisetour or HAL Land Trip or after baggage leaves our actual custody at the conclusion of your Cruise, Cruisetour or HAL Land Trip; (2) any loss, damage or delay while baggage is not in our custody which includes any period during which baggage is in the custody of airlines (including airlines booked as part of a HAL Air Package); or (3) damage due to wear, tear or normal usage. For security and legal reasons, baggage is subject to search, and illegal or potentially unsafe property is subject to seizure, both before and during the Cruise, Cruisetour and/or HAL Land Trip.

(c) We do not assume any liability for any loss of or damage to or delay of perishable items, medicine, liquor, cash, credit or debit cards, jewelry, gold, silver or similar valuables, including but not limited to those specified in Title 46 of the United States Code section 30503, securities, financial instruments, records or other valuable or business documents, computers, cellular telephones, cameras, hearing aids, electric wheelchairs, scooters, or other video or electronic equipment, binoculars, film, videotape, computer disks, audio disks, tapes or CDs. These items should not be left lying about the Ship or your cabin, nor should they be left unattended on other vessels, railcars or other vehicles or in hotels, or placed in luggage other than a bag that you carry with you. In addition, we do not assume any liability for any loss of or damage to carry-on baggage left unattended on the Ship or on other means of transportation or in hotels. The Ship and certain hotels may be equipped with cabin or room safes or safe-deposit boxes in the Ship's or hotel's Front Office; using these facilities will not, however, increase our liability as provided in this contract.

(d) The fare has been established on the basis of our assumption that the total value of your property that you are taking with you on the Cruise, Cruisetour and HAL Land Trip (exclusive of the items mentioned in Clause 7(c) above) will not exceed $100 (U.S.), or $600 (U.S.) if you purchased from us the Cancellation Protection Plan and Additional Baggage Protection. Accordingly, if we, due to any cause whatsoever, are liable for loss or damage to, or delay of, your property, the amount of our aggregate liability will not exceed $100/$600 (as is applicable) unless you have specified to us the true value of your property and paid before commencement of the Cruise, Cruisetour or HAL Land Trip, at the Ship's Front Office or directly to us, 1% of the value in excess of $100/$600. In that event, our aggregate liability will be limited to the amount so specified. Whether or not a value in excess of $100/$600 has been specified, the limit on liability will be proportionately reduced in any case where less than all of your property is lost, damaged or delayed. Without increasing the above limits: (1) our aggregate

liability will never exceed, and all settlements will be made on the basis of, original cost less depreciation; (2) damaged items will be settled on the basis of repair costs; and (3) lost, damaged or delayed baggage must be reported to a HAL representative within 48 hours after discovery and written claim to us must be made within 30 days after conclusion of the Cruise or Cruisetour as provided in Clause A.3 above.

8. Passenger Liability in Certain Cases: You will be required to reimburse us for all expenses we incur as a result of any misrepresentation made by you, as a result of the need to provide you with medical services, as a result of your detention by immigration, health or port authorities, or as a result of any personal injury or damage caused by your acts or omissions or the acts or omissions of any minor (under age 21) traveling with you. We will have a lien for such expenses on your property that you have taken with you on your Cruise, Cruisetour or HAL Land Trip. If, due to weather or other unforeseen reasons, flights are adversely impacted or you are otherwise required to spend an additional night in a location, hotel and meal costs are your responsibility.

9. Travel Agents: Any travel agent you use in connection with your Cruise, Cruisetour or HAL Land Trip acts solely for you and is deemed your agent. We are not responsible for the financial condition or integrity of any such travel agent. In the event that an agent fails to remit to us any monies paid by you to the agent, you remain liable for the fare due us, regardless of whether we demand payment before or after Initial Departure. Any refund made by us to an agent on your behalf is considered, for purposes of this contract, as being the same as payment to you whether or not the monies are delivered by the agent to you. Receipt of any documents or information by your travel agent, including but not limited to this contract, shall be deemed to constitute receipt by you.

10. Passenger Condition: There are risks inherent to being aboard the Ship and other means of transportation. These include, by way of example, having to evacuate the Ship or other means of transportation in case of emergency, having to move about on the Ship or other vessels during rough seas and lack of access to full medical services. For people who are ill or who are mentally or physically disabled or impaired, these risks are more significant. For example: access to all parts of the Ship, other means of transportation or to facilities on shore may be difficult or impossible for some passengers. In addition, medical evacuations during the cruise, whether at sea, by tender, or by deviating from the scheduled itinerary, may create an increased risk of harm and may not be feasible for a variety of reasons. We reserve the right to determine, in our sole discretion exercised in good faith, whether and when a medical evacuation from the ship will occur. For these reasons, we require that if you have any special medical, physical or other requirements, these be brought to our attention immediately upon receipt of this contract. In limited situations where you would be unable to satisfy certain specified safety and other criteria, even when provided with appropriate auxiliary aids and services, we reserve the right to refuse permission to participate in all or part of the Cruise, Cruisetour and/or HAL Land Trips.

11. Compliance with Laws/Minors: Immigration, health and other laws, both in the United States and other countries, may require that you obtain a certain visa, hold a passport, be inoculated, obtain parental consent or otherwise obtain documentation prior to entering or returning to a country. It is your responsibility to take all steps as may be required to enable you to comply with these laws. All persons under 18 years of age must be accompanied and supervised by a parent or guardian. Persons under 21 years of age are not permitted to consume alcoholic beverages; parents and guardians are obligated to insure compliance with this requirement.

12. Personal Information; Authority to Use and Sell Pictures, Video Images and Audio Recordings: Personal information we collect from you may be used by us or our affiliates for marketing purposes; it will not, however, be sold to unaffiliated third parties. In addition, some governmental and quasi-governmental agencies require or request that we provide them with your personal information. You authorize us to use and/or provide to others your personal information as described above and acknowledge that we do not assume any liability to you for our doing so. We periodically photograph or otherwise film people participating in Cruises, Cruisetours and/or HAL Land Trips for retail, marketing, promotional, publicity and training purposes. Without any requirement that we compensate you or obtain any additional approvals from you, we are authorized to include photographic, video recordings and other visual portrayals of you, as well as voice recordings included with any videos, in photographs, videos, DVDs or other mediums that we sell at retail or utilize for marketing, promotional, publicity and/or training activities.

13. Transferability; Separability: This contract cannot be transferred by you. Any additions, deletions or other alterations to, or waivers of any term of, this contract which are purported to have been made by us and which have not been agreed to in writing by the President of HAL will not be legally binding upon us. Any provision of this contract which is prohibited or unenforceable in any jurisdiction will, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability and the validity and enforceability of the remaining terms and conditions of this contract will not otherwise be affected, nor will the validity and enforceability of such provision be affected in any other jurisdiction.

B. THE CRUISE OR CRUISETOUR

1. Additions to Fare/Non-Discountable Amount, Taxes and Surcharges: (a) The fare that you paid was determined far in advance of Initial Departure on the basis of then-existing projections of fuel and other costs. In the event of an increase in fuel or other costs above amounts projected, we have the right to increase the fare at any time up to Initial Departure and to require payment of the additional fare prior to Initial Departure. We have the right to refuse to transport you unless the additional fare is paid. Within seven (7) days after you are notified of the additional fare (but no later than Initial Departure), you may elect to surrender this contract to us for cancellation, whereupon you will receive the Refund Amount. Cancellation

fees do not apply to this type of refund.

(b) Your cruise fare includes a "Non-Discountable Amount." That portion of the fare is both non-commissionable to travel agents and not subject to reduction in the event of a percentage discount promotion, 2 for 1 promotion or otherwise. In addition to your cruise fare, you will also be charged an amount for Taxes. That term, as used by us, refers to certain taxes, fees and charges imposed by governmental or quasi-governmental authorities, including port authorities, relating to any aspect of your cruise or tour. If governmental action results in any element of Taxes exceeding the estimates used by us for purposes of computing the quoted amount, we reserve the right to pass through the extra amount. Similarly, we reserve the right to impose or pass through fuel surcharges, security surcharges or similar incidental surcharges. No right of cancellation exists under either of these circumstances.

2. Hostilities: Although unlikely, the Ship may be confronted by actual or threatened war, warlike operations or hostilities. In addition to our right to deal with this situation under our general right to respond to safety concerns, we may also decide that it would be prudent for the Ship to sail with or without lights, omit observance of practices, rules and regulations as to navigation, cargo or others applicable in time of peace, or sail armed or unarmed and with or without convoy.

3. Holland America Brochure/Cancellations Policy: If not already received, you can obtain the Holland America Line brochure for the Cruise or Cruisetour from your travel agent or us. You should familiarize yourself with the brochure as well as with the What You Need to Know Before You Go booklet that we provided you with. Please be advised, however, that if the brochure or booklet is inconsistent with this contract, this contract will be controlling. Note in particular our cancellations policy which specifies cancellation fees that you will be subject to if this contract is surrendered for cancellation within certain time periods prior to Initial Departure. Since a cancellation likely means a lost opportunity to sell space on other Cruises or Cruisetours, these fees apply regardless of whether your space is resold. You hereby agree that losses sustained by us in the event of your cancellation would be very difficult or impossible to quantify, and that the fees set forth in our cancellations policy represent a fair and reasonable assessment as liquidated damages.

C. HAL AIR PACKAGE

1. Arrangements by HAL: If you are participating in our Fly Cruise Plan or Fly Cruise and Tour Plan, we will arrange for air transportation from the home cities listed in our brochure to the departure point of your Cruise or Cruisetour and return air transportation from the termination point of your Cruise or Cruisetour to the home city from which you departed. Due to the special fares and capacity controls we have with airlines, we retain the right to select carriers and determine routings. Some routings may involve travel to an airport other than in the city where the Ship embarks or disembarks. In those cases, motorcoach transportation to and/or from the Ship will be provided. Flight schedules and/or availability may require overnight hotel accommodations either to join and/or to return from your Cruise or Cruisetour. Please refer to the applicable Holland America Line brochure regarding our policies on booking hotels and responsibility for the costs of hotels and associated services.

2. Schedule Changes/Air Delays: We reserve the right to change or alter air flights as required by airline schedule changes. If tickets have already been issued, we will adjust your itinerary or air carrier, accordingly. In that event, we may ask you to return your tickets to your travel agent. Should you choose to alter your airline schedule in any way once your tickets have been issued, airline charges which result will be your responsibility. If our assistance is requested in changing airline arrangements within 60 days of departure, an additional administrative charge will be levied in addition to any charges imposed by airlines. If your flights are delayed, refer to our What You Need to Know Before You Go booklet for instructions.

3. Refunds/Seat Assignments/Special Services/Fares/Lost Tickets/Baggage Charges: The maximum refund to you for unused flight coupons will not exceed the air add-on or cruise only credit amount paid to us. We cannot make or confirm seat assignments, special meals or other special services. Your travel agent may assist with these arrangements. Please note that because of changing airline tariffs, your actual air ticket may reflect fares higher or lower than the air add-on or cruise only credit amounts shown in the Holland America Line brochure. If so, the difference is neither chargeable nor refundable to you. If, however, airline fuel or other surcharges or additional governmental taxes or levies are imposed, we reserve the right to pass these through to you. Please keep your airline tickets in a safe place. Should they be lost, you will be responsible for their replacement. Each airline has its own baggage allowance policy. You are responsible for any excess baggage charges imposed by airlines.

4. Liability and Relationship With Airlines: We will use our best efforts to arrange for your air transportation. If, however, due to any cause beyond our control, we are unable to arrange for air transportation (including, for example, because of capacity controls placed upon us by airlines due to the types of fares under which we book) or the air transportation we arrange is unavailable or otherwise fails to materialize, our sole liability will be limited to refunding the air add-on paid or cruise only credit. Our relationship with airlines is that of an independent travel agent. We assume no liability for any acts or omissions of any airline including, without limitation, those involving cancellation of flights, schedule changes, re-routings, damage to or delay or loss of baggage, flight delays, equipment failures, accidents, pilot or other staff shortages, overbooking or computer errors. Accordingly, you will not have any right to claim or recover against us as a consequence of any act or omission of any airline. The liabilities and obligations of an airline to you, and your rights against an airline, are subject to any and all terms and conditions of the airline's ticket and tariffs and any and all governmental laws and regulations bearing upon or otherwise relating to such rights, liabilities and obligations.

updated 10/09/07

Call your travel professional or 1-877-932-4259 to book your cruise today.

APPENDIX D

END-USER LICENSE AGREEMENT FOR MICROSOFT SOFTWARE

MICROSOFT WINDOWS XP PROFESSIONAL EDITION SERVICE PACK 2

IMPORTANT—READ CAREFULLY: This End-User License Agreement ("EULA") is a legal agreement between you (either an individual or a single entity) and Microsoft Corporation or one of its affiliates ("Microsoft") for the Microsoft software that accompanies this EULA, which includes computer software and may include associated media, printed materials, "online" or electronic documentation, and Internet-based services ("Software"). An amendment or addendum to this EULA may accompany the Software. YOU AGREE TO BE BOUND BY THE TERMS OF THIS EULA BY INSTALLING, COPYING, OR OTHERWISE USING THE SOFTWARE. IF YOU DO NOT AGREE, DO NOT INSTALL, COPY, OR USE THE SOFTWARE; YOU MAY RETURN IT TO YOUR PLACE OF PURCHASE FOR A FULL REFUND, IF APPLICABLE.

---

1. GRANT OF LICENSE. Microsoft grants you the following rights provided that you comply with all terms and conditions of this EULA:

1.1 **Installation and use.** You may install, use, access, display and run one copy of the Software on a single computer, such as a workstation, terminal or other device ("Workstation Computer"). The Software may not be used by more than two (2) processors at any one time on any single Workstation Computer.

1.2 **Mandatory Activation. The license rights granted under this EULA are limited to the first thirty (30) days after you first install the Software unless you supply information required to activate your licensed copy in the manner described during the setup sequence of the Software.** You can activate the Software through the use of the Internet or telephone; toll charges may apply. You may also need to reactivate the Software if you modify your computer hardware or alter the Software. There are technological measures in this Software that are designed to prevent unlicensed use of the Software. Microsoft will use those measures to confirm you have a legally licensed copy of the Software. If you are not using a licensed copy of the Software, you are not allowed to install the Software or future Software updates. **Microsoft will not collect any personally identifiable information from your Workstation Computer during this process.**

1.3 **Device Connections.** You may permit a maximum of ten (10) computers or other electronic devices (each a "Device") to connect to the Workstation Computer to utilize one or more of the following services of the Software: File Services, Print Services, Internet Information Services, Internet Connection Sharing and telephony services. The ten connection maximum includes any indirect connections made through "multiplexing" or other software or hardware which pools or aggregates connections. This ten connection maximum does not apply to other uses of the Software, such as synchronizing data between a Device and the Workstation Computer, provided only one user uses, accesses, displays or runs the Software at any one time. This Section 1.3 does not grant you rights to access a Workstation Computer Session from any Device. A "Session" means any use of the Software that enables functionality similar to that available to an end user who is interacting with the Workstation Computer through any combination of input, output and display peripherals.

1.4 **Remote Desktop/Remote Assistance/NetMeeting.** The Software contains Remote Desktop, Remote Assistance, and NetMeeting technologies that enable

the Software or applications installed on the Workstation Computer (sometimes referred to as a host device) to be accessed remotely from other Devices. You may use the Software's Remote Desktop feature (or other software which provides similar functionality for a similar purpose) to access a Workstation Computer Session from any Device provided you acquire a separate Software license for that Device. As an exception to this rule, the person who is the single primary user of the Workstation Computer may access a Workstation Computer Session from any Device without acquiring an additional Software license for that Device. When you are using Remote Assistance or NetMeeting (or other software which provides similar functionality for a similar purpose) you may share a Session with other users without any limit on the number of Device connections and without acquiring additional licenses for the Software. For Microsoft and non-Microsoft applications, you should consult the license agreement accompanying the applicable software or contact the applicable licensor to determine whether use of the software with Remote Desktop, Remote Assistance, or NetMeeting is permitted without an additional license.

1.5 **Storage/Network Use.** You may also store or install a copy of the Software on a storage device, such as a network server, used only to install or run the Software on your other Workstation Computers over an internal network; however, you must acquire and dedicate an additional license for each separate Workstation Computer on or from which the Software is installed, used, accessed, displayed or run. Except as otherwise permitted by the NetMeeting and Remote Assistance features described above, *a license for the Software may not be shared or used concurrently on different Workstation Computers.*

2. AUTOMATIC INTERNET-BASED SERVICES. The Software features described below are enabled by default to connect via the Internet to Microsoft computer systems automatically, without separate notice to you. You consent to the operation of these features, unless you choose to switch them off or not use them. Microsoft does not obtain personal information through any of these features. For more information about these features, please see your Software documentation, the Microsoft online support site, or the privacy statement at http://go.microsoft.com/fwlink/?LinkId=25243.

2.1 *Windows Update Features.* If you connect hardware to your Workstation Computer, it may not have the drivers needed to communicate with that hardware. The Software's update feature can obtain the correct drivers from Microsoft and install them on your device. You can switch this update feature off.

2.2 *Web Content Features.* Under the Software's default configuration, if you are connected to the Internet, several features of the Software are enabled by default to retrieve content from Microsoft computer systems and display it to you. When you activate such a feature, it uses standard Internet protocols, which transmit the type of operating system, browser and language code of your Workstation Computer to the Microsoft computer system so that the content can be viewed properly from your Workstation Computer. These features only operate when you activate them, and you may choose to switch them off or not use them. Examples of these features include Windows Catalog, Search Assistant, and the Headlines and Search features of Help and Support Center.

2.3 *Digital Certificates.* The Software uses digital certificates based on the x.509 standard. These digital certificates confirm the identity of Internet users sending x.509 standard encrypted information. The software retrieves certificates and updates

certificate revocation lists. These security features operate only when you use the Internet.

2.4 *Auto Root Update.* The Auto Root Update feature updates the list of trusted certificate authorities. You can switch off the Auto Root Update feature.

2.5 *Windows Media Player.* Some features of Windows Media Player automatically contact Microsoft computer systems if you use Windows Media Player or specific features of it: features that (A) check for new codecs if your Workstation Computer does not have the correct ones for content you attempt to play (this feature may be switched off), and (B) check for new versions of Windows Media Player (this feature will operate only when you are using Windows Media Player).

2.6 *Windows Media Digital Rights Management.* Content providers are using the digital rights management technology for Windows Media contained in this Software ("WM-DRM") to protect the integrity of their content ("Secure Content") so that their intellectual property, including copyright, in such content is not misappropriated. Portions of this Software and third party applications such as media players use WM-DRM to play Secure Content ("WM-DRM Software"). If the WM-DRM Software's security has been compromised, owners of Secure Content ("Secure Content Owners") may request that Microsoft revoke the WM-DRM Software's right to copy, display and/or play Secure Content. Revocation does not alter the WM-DRM Software's ability to play unprotected content. A list of revoked WM-DRM Software is sent to your Workstation Computer whenever you download a license for Secure Content from the Internet. Microsoft may, in conjunction with such license, also download revocation lists onto your Workstation Computer on behalf of Secure Content Owners. Secure Content Owners may also require you to upgrade some of the WM-DRM components in this Software ("WM-DRM Upgrades") before accessing their content. When you attempt to play such content, WM-DRM Software built by Microsoft will notify you that a WM-DRM Upgrade is required and then ask for your consent before the WM-DRM Upgrade is downloaded. WM-DRM Software built by third parties may do the same. If you decline the upgrade, you will not be able to access content that requires the WM-DRM Upgrade; however, you will still be able to access unprotected content and Secure Content that does not require the upgrade. WM-DRM features that access the Internet, such as acquiring new licenses and/or performing a required WM-DRM Upgrade, can be switched off. When these features are switched off, you will still be able to play Secure Content if you have a valid license for such content already stored on your Workstation Computer.

3. RESERVATION OF RIGHTS AND OWNERSHIP. Microsoft reserves all rights not expressly granted to you in this EULA. The Software is protected by copyright and other intellectual property laws and treaties. Microsoft or its suppliers own the title, copyright, and other intellectual property rights in the Software. **The Software is licensed, not sold.**

4. LIMITATIONS ON REVERSE ENGINEERING, DECOMPILATION, AND DISASSEMBLY. You may not reverse engineer, decompile, or disassemble the Software, except and only to the extent that such activity is expressly permitted by applicable law notwithstanding this limitation.

5. NO RENTAL/COMMERCIAL HOSTING. You may not rent, lease, lend or provide commercial hosting services with the Software.

6. LINKS TO THIRD PARTY SITES. You may link to third party sites through the use of the Software. The third party sites are not under the control of Microsoft, and Microsoft is not responsible for the contents of any third party sites, any links contained in third party sites, or any changes or updates to third party sites. Microsoft is not responsible for webcasting or any other form of transmission received from any third party sites. Microsoft is providing these links to third party sites to you only as a convenience, and the inclusion of any link does not imply an endorsement by Microsoft of the third party site.

7. ADDITIONAL SOFTWARE/SERVICES. This EULA applies to updates, supplements, add-on components, product support services, or Internet-based services components, of the Software that you may obtain from Microsoft after the date you obtain your initial copy of the Software, unless you accept updated terms or another agreement governs. Microsoft reserves the right to discontinue any Internet-based services provided to you or made available to you through the use of the Software.

8. UPGRADES. To use Software identified as an upgrade, you must first be licensed for the software identified by Microsoft as eligible for the upgrade. After upgrading, you may no longer use the software that formed the basis for your upgrade eligibility.

9. NOT FOR RESALE SOFTWARE. Software identified as "Not For Resale" or "NFR," may not be sold or otherwise transferred for value, or used for any purpose other than demonstration, test or evaluation.

10. ACADEMIC EDITION SOFTWARE. To use Software identified as "Academic Edition" or "AE," you must be a "Qualified Educational User." For qualification-related questions, please contact the Microsoft Sales Information Center/One Microsoft Way/Redmond, WA 98052-6399 or the Microsoft subsidiary serving your country.

11. NOTICES REGARDING THE MPEG-4 VISUAL STANDARD. The Software includes MPEG-4 visual decoding technology. This technology is a format for data compression of video information. For this technology, MPEG LA, L.L.C. requires this notice:

USE OF THIS PRODUCT IN ANY MANNER THAT COMPLIES WITH THE MPEG-4 VISUAL STANDARD IS PROHIBITED, EXCEPT FOR USE DIRECTLY RELATED TO (A) DATA OR INFORMATION (i) GENERATED BY AND OBTAINED WITHOUT CHARGE FROM A CONSUMER NOT THEREBY ENGAGED IN A BUSINESS ENTERPRISE, AND (ii) FOR PERSONAL USE ONLY; AND (B) OTHER USES SPECIFICALLY AND SEPARATELY LICENSED BY MPEG LA, L.L.C.

If you have questions regarding this notice, please contact MPEG LA, L.L.C., 250 Steele Street, Suite 300, Denver, Colorado 80206; Telephone 303 331.1880; FAX 303 331.1879; <http://www.mpegla.com>.

12. EXPORT RESTRICTIONS. You acknowledge that the Software is subject to U.S. export jurisdiction. You agree to comply with all applicable international and national laws that apply to the Software, including the U.S. Export Administration Regulations, as well as end-user, end-use, and destination restrictions issued by U.S. and other governments. For additional information see <http://www.microsoft.com/exporting/>.

13. END USER PROOF OF LICENSE. If you acquired the Software on a compact disc or other media, a genuine Microsoft "Proof of License" label with a genuine copy of the software identifies a licensed copy of the Software. To be valid, the label must appear on Microsoft

software packaging. If you receive the label separately, it is invalid. You should keep the packaging that has the label on it to prove that you are licensed to use the Software.

14. SOFTWARE TRANSFER. *Internal.* You may move the Software to a different Workstation Computer. After the transfer, you must completely remove the Software from the former Workstation Computer. *Transfer to Third Party.* The initial user of the Software may make a one-time permanent transfer of this EULA and Software to another end user, provided the initial user retains no copies of the Software. This transfer must include the Software and the Proof of License label. The transfer may not be an indirect transfer, such as a consignment. Prior to the transfer, the end user receiving the Software must agree to all the EULA terms.

15. TERMINATION. Without prejudice to any other rights, Microsoft may terminate this EULA if you fail to comply with the terms and conditions of this EULA. In such event, you must destroy all copies of the Software and all of its component parts.

16. NOTICE REGARDING SECURITY. To help protect against breaches of security and malicious software, periodically back up your data and system information, use security features such as firewalls, and install and use security updates.

17. LIMITED WARRANTY FOR SOFTWARE ACQUIRED IN THE US AND CANADA.

Microsoft warrants that the Software will perform substantially in accordance with the accompanying materials for a period of ninety (90) days from the date of receipt.

If an implied warranty or condition is created by your state/jurisdiction and federal or state/provincial law prohibits disclaimer of it, you also have an implied warranty or condition, BUT ONLY AS TO DEFECTS DISCOVERED DURING THE PERIOD OF THIS LIMITED WARRANTY (NINETY DAYS). AS TO ANY DEFECTS DISCOVERED AFTER THE NINETY-DAY PERIOD, THERE IS NO WARRANTY OR CONDITION OF ANY KIND. Some states/jurisdictions do not allow limitations on how long an implied warranty or condition lasts, so the above limitation may not apply to you.

Any supplements or updates to the Software, including without limitation, any (if any) service packs or hot fixes provided to you after the expiration of the ninety day Limited Warranty period are not covered by any warranty or condition, express, implied or statutory.

LIMITATION ON REMEDIES; NO CONSEQUENTIAL OR OTHER DAMAGES. Your exclusive remedy for any breach of this Limited Warranty is as set forth below. **Except for any refund elected by Microsoft, YOU ARE NOT ENTITLED TO ANY DAMAGES,** INCLUDING BUT NOT LIMITED TO CONSEQUENTIAL DAMAGES, **if the Software does not meet Microsoft's Limited Warranty, and, to the maximum extent allowed by applicable law, even if any remedy fails of its essential purpose.** The terms of Section 19 ("Exclusion of Incidental, Consequential and Certain Other Damages") are also incorporated into this Limited Warranty. Some states/jurisdictions do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you. This Limited Warranty gives you specific legal rights. You may have other rights which vary from state/jurisdiction to state/jurisdiction. YOUR EXCLUSIVE REMEDY. Microsoft's and its suppliers' entire liability and your exclusive remedy for any breach of this Limited Warranty or for any other breach of this EULA or for any other liability relating to the Software shall be, at Microsoft's option from time to time exercised subject to applicable law, (a) return of the amount paid (if any) for the Software, or (b) repair or replacement of the Software, that does not meet this Limited Warranty and that is returned to Microsoft with a copy of your receipt. You will receive the remedy elected by Microsoft without charge, except that you are responsible for

any expenses you may incur (e.g. cost of shipping the Software to Microsoft). This Limited Warranty is void if failure of the Software has resulted from accident, abuse, misapplication, abnormal use or a virus. Any replacement Software will be warranted for the remainder of the original warranty period or thirty (30) days, whichever is longer, and Microsoft will use commercially reasonable efforts to provide your remedy within a commercially reasonable time of your compliance with Microsoft's warranty remedy procedures. Outside the United States or Canada, neither these remedies nor any product support services offered by Microsoft are available without proof of purchase from an authorized international source. To exercise your remedy, contact: Microsoft, Attn. Microsoft Sales Information Center/One Microsoft Way/Redmond, WA 98052-6399, or the Microsoft subsidiary serving your country.

18. DISCLAIMER OF WARRANTIES. The Limited Warranty that appears above is the only express warranty made to you and is provided in lieu of any other express warranties or similar obligations (if any) created by any advertising, documentation, packaging, or other communications. Except for the Limited Warranty and to the maximum extent permitted by applicable law, Microsoft and its suppliers provide the Software and support services (if any) *AS IS AND WITH ALL FAULTS*, and hereby disclaim all other warranties and conditions, whether express, implied or statutory, including, but not limited to, any (if any) implied warranties, duties or conditions of merchantability, of fitness for a particular purpose, of reliability or availability, of accuracy or completeness of responses, of results, of workmanlike effort, of lack of viruses, and of lack of negligence, all with regard to the Software, and the provision of or failure to provide support or other services, information, software, and related content through the Software or otherwise arising out of the use of the Software. ALSO, THERE IS NO WARRANTY OR CONDITION OF TITLE, QUIET ENJOYMENT, QUIET POSSESSION, CORRESPONDENCE TO DESCRIPTION OR NON-INFRINGEMENT WITH REGARD TO THE SOFTWARE.

19. EXCLUSION OF INCIDENTAL, CONSEQUENTIAL AND CERTAIN OTHER DAMAGES. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, IN NO EVENT SHALL MICROSOFT OR ITS SUPPLIERS BE LIABLE FOR ANY SPECIAL, INCIDENTAL, PUNITIVE, INDIRECT, OR CONSEQUENTIAL DAMAGES WHATSOEVER (INCLUDING, BUT NOT LIMITED TO, DAMAGES FOR LOSS OF PROFITS OR CONFIDENTIAL OR OTHER INFORMATION, FOR BUSINESS INTERRUPTION, FOR PERSONAL INJURY, FOR LOSS OF PRIVACY, FOR FAILURE TO MEET ANY DUTY INCLUDING OF GOOD FAITH OR OF REASONABLE CARE, FOR NEGLIGENCE, AND FOR ANY OTHER PECUNIARY OR OTHER LOSS WHATSOEVER) ARISING OUT OF OR IN ANY WAY RELATED TO THE USE OF OR INABILITY TO USE THE SOFTWARE, THE PROVISION OF OR FAILURE TO PROVIDE SUPPORT OR OTHER SERVICES, INFORMATON, SOFTWARE, AND RELATED CONTENT THROUGH THE SOFTWARE OR OTHERWISE ARISING OUT OF THE USE OF THE SOFTWARE, OR OTHERWISE UNDER OR IN CONNECTION WITH ANY PROVISION OF THIS EULA, EVEN IN THE EVENT OF THE FAULT, TORT (INCLUDING NEGLIGENCE), MISREPRESENTATION, STRICT LIABILITY, BREACH OF CONTRACT OR BREACH OF WARRANTY OF MICROSOFT OR ANY SUPPLIER, AND EVEN IF MICROSOFT OR ANY SUPPLIER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

20. LIMITATION OF LIABILITY AND REMEDIES. Notwithstanding any damages that you might incur for any reason whatsoever (including, without limitation, all damages referenced herein and all direct or general damages in contract or anything else), the entire liability of Microsoft and any of its suppliers under any provision of this EULA and your

exclusive remedy hereunder (except for any remedy of repair or replacement elected by Microsoft with respect to any breach of the Limited Warranty) shall be limited to the greater of the actual damages you incur in reasonable reliance on the Software up to the amount actually paid by you for the Software or US$5.00. The foregoing limitations, exclusions and disclaimers (including Sections 17, 18, and 19) shall apply to the maximum extent permitted by applicable law, even if any remedy fails its essential purpose.

21. U.S. GOVERNMENT LICENSE RIGHTS. All Software provided to the U.S. Government pursuant to solicitations issued on or after December 1, 1995 is provided with the commercial license rights and restrictions described elsewhere herein. All Software provided to the U.S. Government pursuant to solicitations issued prior to December 1, 1995 is provided with "Restricted Rights" as provided for in FAR, 48 CFR 52.227-14 (JUNE 1987) or DFAR, 48 CFR 252.227-7013 (OCT 1988), as applicable.

22. APPLICABLE LAW. If you acquired this Software in the United States, this EULA is governed by the laws of the State of Washington. If you acquired this Software in Canada, unless expressly prohibited by local law, this EULA is governed by the laws in force in the Province of Ontario, Canada; and, in respect of any dispute which may arise hereunder, you consent to the jurisdiction of the federal and provincial courts sitting in Toronto, Ontario. If you acquired this Software in the European Union, Iceland, Norway, or Switzerland, then local law applies. If you acquired this Software in any other country, then local law may apply.

23. ENTIRE AGREEMENT; SEVERABILITY. This EULA (including any addendum or amendment to this EULA which is included with the Software) is the entire agreement between you and Microsoft relating to the Software and the support services (if any) and they supersede all prior or contemporaneous oral or written communications, proposals and representations with respect to the Software or any other subject matter covered by this EULA. To the extent the terms of any Microsoft policies or programs for support services conflict with the terms of this EULA, the terms of this EULA shall control. If any provision of this EULA is held to be void, invalid, unenforceable or illegal, the other provisions shall continue in full force and effect.

Si vous avez acquis votre produit Microsoft au CANADA, la garantie limitée suivante vous concerne :

GARANTIE LIMITÉE

Microsoft garantit que le Logiciel fonctionnera conformément aux documents inclus pendant une période de 90 jours suivant la date de réception.

Si une garantie ou condition implicite est créée par votre État ou votre territoire et qu'une loi fédérale ou provinciale ou État en interdit le déni, vous jouissez également d'une garantie ou condition implicite, MAIS UNIQUEMENT POUR LES DÉFAUTS DÉCOUVERTS DURANT LA PÉRIODE DE LA PRÉSENTE GARANTIE LIMITÉE (QUATRE-VINGT-DIX JOURS). IL N'Y A AUCUNE GARANTIE OU CONDITION DE QUELQUE NATURE QUE CE SOIT QUANT AUX DÉFAUTS DÉCOUVERTS APRÈS CETTE PÉRIODE DE QUATRE-VINGT-DIX JOURS. Certains États ou territoires ne permettent pas de limiter la durée d'une garantie ou condition implicite de sorte que la limitation ci-dessus peut ne pas s'appliquer à vous.

Tous les suppléments ou toutes les mises à jour relatifs au Logiciel, notamment, les ensembles de services ou les réparations à chaud (le cas échéant) qui vous sont fournis après l'expiration de la période de quatre-vingt-dix jours de la garantie limitée ne sont pas couverts par quelque garantie ou condition que ce soit, expresse ou implicite.

LIMITATION DES RECOURS; ABSENCE DE DOMMAGES INDIRECTS OU AUTRES. Votre recours exclusif pour toute violation de la présente garantie limitée est décrit ci-après. Sauf pour tout remboursement au choix de Microsoft, si le Logiciel ne respecte pas la garantie limitée de Microsoft et, dans la mesure maximale permise par les lois applicables, même si tout recours n'atteint pas son but essentiel, VOUS N'AVEZ DROIT À AUCUNS DOMMAGES, NOTAMMENT DES DOMMAGES INDIRECTS. Les modalités de la clause «Exclusion des dommages accessoires, indirects et de certains autres dommages » sont également intégrées à la présente garantie limitée. Certains États ou territoires ne permettent pas l'exclusion ou la limitation des dommages indirects ou accessoires de sorte que la limitation ou l'exclusion ci-dessus peut ne pas s'appliquer à vous. La présente garantie limitée vous donne des droits légaux spécifiques. Vous pouvez avoir d'autres droits qui peuvent varier d'un territoire ou d'un État à un autre. VOTRE RECOURS EXCLUSIF. L'obligation intégrale de Microsoft et de ses fournisseurs et votre recours exclusif seront, selon le choix de Microsoft de temps à autre sous réserve de toute loi applicable, a) le remboursement du prix payé, le cas échéant, pour le Logiciel ou b) la réparation ou le remplacement du Logiciel qui ne respecte pas la présente garantie limitée et qui est retourné à Microsoft avec une copie de votre reçu. Vous recevrez la compensation choisie par Microsoft, sans frais, sauf que vous êtes responsable des dépenses que vous pourriez engager (p. ex., les frais d'envoi du Logiciel à Microsoft). La présente garantie limitée est nulle si la défectuosité du Logiciel est causée par un accident, un usage abusif, une mauvaise application, un usage anormal ou un virus. Tout Logiciel de remplacement sera garanti pour le reste de la période de garantie initiale ou pendant trente (30) jours, selon la plus longue entre ces deux périodes. À l'extérieur des États-Unis ou du Canada, ces recours ou l'un quelconque des services de soutien technique offerts par Microsoft ne sont pas disponibles sans preuve d'achat d'une source internationale autorisée. Pour exercer votre recours, vous devez communiquer avec Microsoft et vous adresser au Microsoft Sales Information Center/One Microsoft Way/Redmond, WA 98052-6399, ou à la filiale de Microsoft de votre pays.

DÉNI DE GARANTIES. La garantie limitée mentionnée ci-dessus constitue la seule garantie expresse qui vous est donnée et remplace toutes autres garanties expresses (s'il en est) mentionnées dans un document ou sur un emballage. Sauf en ce qui a trait à la garantie limitée et dans la mesure maximale permise par les lois applicables, le Logiciel et les services de soutien technique (le cas échéant) sont fournis *TELS QUELS ET AVEC TOUS LES DÉFAUTS* par Microsoft et ses fournisseurs, lesquels par les présentes dénient toutes autres garanties et conditions expresses, implicites ou en vertu de la loi, notamment (le cas échéant) les garanties, devoirs ou conditions implicites de qualité marchande, d'adaptation à un usage particulier, d'exactitude ou d'exhaustivité des réponses, des résultats, des efforts déployés selon les règles de l'art, d'absence de virus et de négligence, le tout à l'égard du Logiciel et de la prestation des services de soutien technique ou de l'omission d'une telle prestation. PAR AILLEURS, IL N'Y A AUCUNE GARANTIE OU CONDITION QUANT AU TITRE DE PROPRIÉTÉ, À LA JOUISSANCE OU LA POSSESSION PAISIBLE, À LA CONCORDANCE À UNE DESCRIPTION NI QUANT À UNE ABSENCE DE CONTREFAÇON CONCERNANT LE LOGICIEL.

EXCLUSION DES DOMMAGES ACCESSOIRES, INDIRECTS ET DE CERTAINS AUTRES DOMMAGES. DANS LA MESURE MAXIMALE PERMISE PAR LES LOIS APPLICABLES, EN AUCUN CAS MICROSOFT OU SES FOURNISSEURS NE SERONT RESPONSABLES DES DOMMAGES SPÉCIAUX, CONSÉCUTIFS, ACCESSOIRES OU INDIRECTS DE QUELQUE NATURE QUE CE SOIT (NOTAMMENT, LES DOMMAGES À L'ÉGARD DU MANQUE À GAGNER OU DE LA DIVULGATION DE RENSEIGNEMENTS CONFIDENTIELS OU AUTRES, DE LA PERTE D'EXPLOITATION, DE BLESSURES

CORPORELLES, DE LA VIOLATION DE LA VIE PRIVÉE, DE L'OMISSION DE REMPLIR TOUT DEVOIR, Y COMPRIS D'AGIR DE BONNE FOI OU D'EXERCER UN SOIN RAISONNABLE, DE LA NÉGLIGENCE ET DE TOUTE AUTRE PERTE PÉCUNIAIRE OU AUTRE PERTE DE QUELQUE NATURE QUE CE SOIT) SE RAPPORTANT DE QUELQUE MANIÈRE QUE CE SOIT À L'UTILISATION DU LOGICIEL OU À L'INCAPACITÉ DE S'EN SERVIR, À LA PRESTATION OU À L'OMISSION D'UNE TELLE PRESTATION DE SERVICES DE SOUTIEN TECHNIQUE OU AUTREMENT AUX TERMES DE TOUTE DISPOSITION DU PRÉSENT EULA OU RELATIVEMENT À UNE TELLE DISPOSITION, MÊME EN CAS DE FAUTE, DE DÉLIT CIVIL (Y COMPRIS LA NÉGLIGENCE), DE RESPONSABILITÉ STRICTE, DE VIOLATION DE CONTRAT OU DE VIOLATION DE GARANTIE DE MICROSOFT OU DE TOUT FOURNISSEUR ET MÊME SI MICROSOFT OU TOUT FOURNISSEUR A ÉTÉ AVISÉ DE LA POSSIBILITÉ DE TELS DOMMAGES.

LIMITATION DE RESPONSABILITÉ ET RECOURS. Malgré les dommages que vous puissiez subir pour quelque motif que ce soit (notamment, tous les dommages susmentionnés et tous les dommages directs ou généraux), l'obligation intégrale de Microsoft et de l'un ou l'autre de ses fournisseurs aux termes de toute disposition du présent EULA et votre recours exclusif à l'égard de tout ce qui précède (sauf en ce qui concerne tout recours de réparation ou de remplacement choisi par Microsoft à l'égard de tout manquement à la garantie limitée) se limite au plus élevé entre les montants suivants : le montant que vous avez réellement payé pour le Logiciel ou 5,00 $US. Les limites, exclusions et dénis qui précèdent (y compris les clauses ci-dessus), s'appliquent dans la mesure maximale permise par les lois applicables, même si tout recours n'atteint pas son but essentiel.

La présente Convention est régie par les lois de la province d'Ontario, Canada. Chacune des parties à la présente reconnaît irrévocablement la compétence des tribunaux de la province d'Ontario et consent à instituer tout litige qui pourrait découler de la présente auprès des tribunaux situés dans le district judiciaire de York, province d'Ontario.

Au cas où vous auriez des questions concernant cette licence ou que vous désiriez vous mettre en rapport avec Microsoft pour quelque raison que ce soit, veuillez contacter la succursale Microsoft desservant votre pays, dont l'adresse est fournie dans ce produit, ou écrivez à : Microsoft Sales Information Center, One Microsoft Way, Redmond, Washington 98052-6399.

The following MICROSOFT GUARANTEE applies to you if you acquired this Software in any other country:

Statutory rights not affected - The following guarantee is not restricted to any territory and does not affect any statutory rights that you may have from your reseller or from Microsoft if you acquired the Software directly from Microsoft. If you acquired the Software or any support services in Australia, New Zealand or Malaysia, please see the "Consumer rights" section below.

The guarantee - The Software is designed and offered as a general-purpose software, not for any user's particular purpose. You accept that no Software is error free and you are strongly advised to back-up your files regularly. Provided that you have a valid license, Microsoft guarantees that a) for a period of 90 days from the date of receipt of your license to use the Software or the shortest period permitted by applicable law it will perform substantially in accordance with the written materials that accompany the Software; and b) any support services provided by Microsoft shall be substantially as described in applicable written materials provided to you by Microsoft and Microsoft support engineers will use reasonable efforts, care

and skill to solve any problem issues. In the event that the Software fails to comply with this guarantee, Microsoft will either (a) repair or replace the Software or (b) return the price you paid. This guarantee is void if failure of the Software results from accident, abuse or misapplication. Any replacement Software will be guaranteed for the remainder of the original guarantee period or 30 days, whichever period is longer. You agree that the above guarantee is your sole guarantee in relation to the Software and any support services.

Exclusion of All Other Terms - To the maximum extent permitted by applicable law and subject to the guarantee above, Microsoft disclaims all warranties, conditions and other terms, either express or implied (whether by statute, common law, collaterally or otherwise) including but not limited to implied warranties of satisfactory quality and fitness for particular purpose with respect to the Software and the written materials that accompany the Software. Any implied warranties that cannot be excluded are limited to 90 days or to the shortest period permitted by applicable law, whichever is greater.

Limitation of Liability - To the maximum extent permitted by applicable law and except as provided in the Microsoft Guarantee, Microsoft and its suppliers shall not be liable for any damages whatsoever (including without limitation, damages for loss of business profits, business interruption, loss of business information or other pecuniary loss) arising out of the use or inability to use the Software, even if Microsoft has been advised of the possibility of such damages. In any case Microsoft's entire liability under any provision of this Agreement shall be limited to the amount actually paid by you for the Software. These limitations do not apply to any liabilities that cannot be excluded or limited by applicable laws.

Consumer rights - Consumers in Australia, New Zealand or Malaysia may have the benefit of certain rights and remedies by reason of the Trade Practices Act and similar state and territory laws in Australia, the Consumer Guarantees Act in New Zealand and the Consumer Protection Act in Malaysia in respect of which liability cannot lawfully be modified or excluded. If you acquired the Software in New Zealand for the purposes of a business, you confirm that the Consumer Guarantees Act does not apply. If you acquired the Software in Australia and if Microsoft breaches a condition or warranty implied under any law which cannot lawfully be modified or excluded by this agreement then, to the extent permitted by law, Microsoft's liability is limited, at Microsoft's option, to: (i) in the case of the Software: a) repairing or replacing the Software; or b) the cost of such repair or replacement; and (ii) in the case of support services: a) re-supply of the services; or b) the cost of having the services supplied again.

Should you have any questions concerning this EULA, or if you desire to contact Microsoft for any reason, please use the address information enclosed in this Software to contact the Microsoft subsidiary serving your country or visit Microsoft on the World Wide Web at http://www.microsoft.com.

EULAID:XPSP2_RM.0_PRO_RTL_EN

APPENDIX E

Terms of Service

Clearwire Wireless Broadband Internet Access Service *Effective March 25, 2008*

THIS IS AN AGREEMENT BETWEEN YOU AND CLEARWIRE US LLC ("CLEARWIRE"). BY USING CLEARWIRE'S WIRELESS BROADBAND INTERNET ACCESS SERVICE (THE "INTERNET ACCESS SERVICE"), ANY RELATED OPTIONAL SERVICES (THE "OPTIONAL SERVICES"), OR ANY EQUIPMENT PURCHASED OR LEASED BY YOU FROM CLEARWIRE ("EQUIPMENT"), YOU AGREE TO BE BOUND BY AND COMPLY WITH THE FOLLOWING TERMS AND CONDITIONS (THE INTERNET ACCESS SERVICE AND THE OPTIONAL SERVICES ARE COLLECTIVELY REFERRED TO AS THE "SERVICE"). THE ADDITIONAL TERMS STATED IN YOUR ORDER FORM (WHICH DETAILS THE SERVICE PLAN(S) YOU HAVE AGREED TO PURCHASE) ARE INCORPORATED HEREIN BY REFERENCE AND ARE PART OF THIS AGREEMENT.
PLEASE READ THIS AGREEMENT CAREFULLY BECAUSE IT INCLUDES MANY IMPORTANT TERMS, INCLUDING:

- LIMITS AND DISCLAIMERS ON CLEARWIRE'S LIABILITY AND WARRANTIES;
- THE REQUIREMENT THAT YOU COMMIT TO A MINIMUM TERM OF SERVICE;
- FEES FOR EARLY TERMINATION;
- THE REQUIREMENT THAT DISPUTES BE SETTLED BY ARBITRATION, AND NOT BY LAWSUIT;
- A WAIVER OF ANY RIGHT TO TRIAL BY JURY OR PARTICIPATION IN A CLASS ACTION; and,
- ADDITIONAL TERMS AND CONDITIONS THAT APPLY TO INTERNET PHONE SERVICE.

1. Agreement Governing Use of Service. The current version of this Agreement (including the Service Plans) can be found at www.clearwire.com/company/legal/terms.htm. Clearwire may change this Agreement or the Service from time to time by posting a revised version of this Agreement or announcing Service changes to the "Service Announcements" section of Clearwire's website: www.clearwire.com/company/legal/announcements.htm. Such changes will become effective once you have been notified, and your continued use of the Service or Equipment will constitute your acceptance of any such changes. However, if you do not wish to continue Service after a change that is materially

disadvantageous to you, you may terminate this Agreement by providing written notice to Clearwire within twenty (20) days of the effective date of the modification, and you will not be charged any Early Termination Fee (as described below). Service(s) may require third party software to be installed in order to function. Clearwire shall not be liable for any use or installation of such Software. Any third party software installed shall be governed by that third party end user license agreement that can be found at www.clearwire.com/legal/eula.htm. Additional terms and conditions for Internet Phone Service can be found at: www.clearwire.com/legal/phone_terms.htm.

2. Term of the Service; Termination Fees. You will maintain Service for the duration of any minimum "Initial Term" (as set forth on the Order Form) and any Renewal Term (defined below). If during the Initial Term or any Renewal Term you decide to change to another Clearwire plan with different rates or features or add Optional Services (such as Internet Phone Service) to your existing Internet Access Service, then you agree that Clearwire may restart the Initial Term or any Renewal Term for the Service, as applicable, from the beginning of such change in plan or addition of service. At the end of an Initial Term or any Renewal Term you will be prompted to let us know if you wish (i) to terminate your Service, (ii) accept a new Service plan for an additional Term (each a "Renewal Term") according to fees in effect at the time of the offering, or (iii) to continue to use the Service on a month-to-month basis according to the then-current fee schedule in effect. If you elect option (iii) please be advised that your monthly-rate may be changed by Clearwire at any time to be effective the following month.
If your Internet Access Service was activated prior to March 1, 2007 and you terminate that Service for any reason, including relocation outside a coverage area, or that Service is terminated by Clearwire for any violation by you of the Agreement prior to the end of the Initial Term or any Renewal Term, as applicable, you will be liable for an early termination fee of $180 or such other early termination fee as may be specified on your Order Form. If your Internet Access Service was activated on or after March 1, 2007 and you terminate that Service for any reason, including relocation outside a coverage area, or that Service is terminated by Clearwire for any violation by you of the Agreement prior to the end of the Initial Term or any Renewal Term, as applicable, you will be liable for an early termination fee of $220 less (a) $5 per month for each full month of Service after the beginning of the Initial Term or the Renewal Term, as applicable, prior to such termination if your Initial Term is for two years and (b) $10 per month for each month of Service after the beginning of the Initial Term or the Renewal Term, as applicable, prior to such termination if your Initial Term is for one year, or (c) such other early termination fee as may be specified on your Order

Form. The early termination fees applicable to your Service as described in this Section 2 are sometimes referred to in these Terms as the "Early Termination Fee."
Subject to applicable law, you expressly agree that all applicable monthly subscription and/or other fees and charges will accrue until this Agreement has terminated, the Services have been disconnected, and all Equipment has been returned to Clearwire. Upon termination or expiration of this Agreement for any reason, Clearwire and its suppliers reserve the right, to the extent permitted by applicable law, to delete any voicemails, data, files, electronic messages or other information stored on Clearwire's or its suppliers' servers or systems. Clearwire, its Affiliates and their agents and suppliers will have no liability whatsoever as the result of the loss of any such data, names or addresses or other information.

3. Payments and Invoices. You will make payments to Clearwire for the Service and Equipment using your credit, debit, or other acceptable bank card (the "Card") or through an electronic funds transfer ("EFT") that debits funds directly from a bank account that you designate. You will ensure that the Card and/or EFT-related information you have provided to Clearwire is valid at all times. Fees and charges for Service are contained in the Order Form. Upon accepting your Order Form, Clearwire will bill you for the Equipment (as applicable), installation fees and activation fees, including any Optional Services (as applicable). Monthly charges will be automatically charged to your credit, debit, or e-check account on record, as specified in any applicable recurring payment plan you enter with Clearwire. You will pay Clearwire all outstanding balances when due.

4. Billing Disputes. You must notify Clearwire in writing no later than thirty (30) days after receiving your Card or bank account statement if you dispute any Clearwire charges on that statement or such dispute will be deemed waived. Clearwire will resolve all billing disputes in its sole discretion.

5. Delinquency/Late Fees.
a. Accounts not paid in full by the due date are subject to suspension or termination by Clearwire. In addition, Clearwire may terminate your Service if your Card expires or the bank account is closed or suspended and you have not provided Clearwire with a valid replacement Card or EFT-related information. In the event of such suspension or termination by Clearwire, you will pay Clearwire any outstanding fees and all collection costs and fees, including attorneys' fees and late fees, incurred or charged by Clearwire. Clearwire may, but is not required to, reactivate your Service after Service has been suspended or terminated. Before Service may be reactivated, you must pay Clearwire all

past due amounts and late payment fees plus a suspension charge per account and applicable taxes, and you may be required to provide Clearwire with a deposit.
b. All delinquent charges and charges not honored by your Card issuer or bank will be subject to a late fee equal to 1.5% (or the highest amount allowed by law, whichever is lower) or $5 per month (or portion of a month), whichever is greater. Except to the extent prohibited by law, this late fee may be charged regardless of any disputes you may have raised regarding your invoiced charges.

6. Availability of Service/Variation of Speed. You acknowledge that Clearwire service may not be available in all areas, and even within coverage areas service quality, signal strength and network speeds may vary, be lower than advertised or be insufficient for use of the Service. You agree to provide Clearwire with the correct address of your primary place of residence, which will be used to determine whether adequate coverage is available. You further agree to promptly notify Clearwire of any changes in the primary Service address.

7. Equipment Provided - Lease. If you lease any Equipment from Clearwire, you must return all leased Equipment in good working order upon the termination or expiration of this Agreement or upon Clearwire's request. If you fail to return all leased Equipment in good working order, reasonable wear and tear excepted, within thirty (30) days after expiration of this Agreement or by the date otherwise specified or requested by Clearwire, you agree to pay Clearwire for the amount listed on the Order Form for such Equipment, which you acknowledge is a reasonable estimation of the repair or replacement cost of the Equipment; provided, that if no amount is specified on such Order Form, you will instead pay to Clearwire the retail value of the Equipment as new. In addition, if you do not return the leased Equipment to Clearwire by the required date, you agree to continue paying Clearwire your monthly Internet Access Service charges until you return the Equipment. You hereby irrevocably authorize Clearwire to charge such amounts (the cost of the Equipment and the monthly Internet Access Service charges) to any Card or bank account you provide or previously have provided to Clearwire for any purpose. You understand that this authorization to charge your Card or bank account for failing to return leased Equipment in good working order may not be revoked even if you revoke authorization to charge your Card or bank account for other purposes. Clearwire may replace, upgrade, repair, or otherwise modify any leased Equipment, and will repair or replace (in Clearwire's sole discretion) any properly maintained leased Equipment that fails to operate as required for the delivery of Service. You also acknowledge and

agree that the modem you are purchasing/leasing may be refurbished equipment, and there shall be no offset, discount, or other reduction in purchase or lease price. You may not modify leased Equipment in any way or sell, encumber, or otherwise transfer the Equipment to others. This section, including all authorizations herein, will survive expiration or termination of this Agreement for any reason.

8. Equipment and Installation Warranty. Clearwire warrants to you that the Equipment and its Installation by Clearwire will be substantially free from material defects in material and workmanship, under normal use in compliance with Clearwire's instructions, for a period of one (1) year from the date you receive the Equipment or installation ("Limited Warranty"). This Limited Warranty excludes any defects resulting from abuse, misuse, neglect, theft, vandalism, fire, unusual physical or electrical stress, water, extremes of temperature, an act of God, your failure to comply with Clearwire's policies or other instructions provided by Clearwire, actual or attempted alteration of or additions to the Equipment not approved by Clearwire, or any other cause beyond the reasonable control of Clearwire, all as determined by Clearwire (collectively, "Excluded Causes"). Repair or replacement, in Clearwire's discretion, of the Equipment and reperformance of the installation is Clearwire's only responsibility, and your exclusive remedy, for breach of any warranty regarding the Equipment or the installation, as applicable. This Limited Warranty is personal to you, and will terminate immediately upon the sale or transfer of the Equipment or expiration or termination of this Agreement.

9. Support. You must use the troubleshooting guides and user information provided by Clearwire or available at: www.clearwire.com/support/support.php prior to contacting Clearwire Customer Care for assistance. In the event that you request a service call to your Service location and Clearwire determines that the problem is your responsibility, you authorize Clearwire to charge your Card or bank account or require you to otherwise pay for the cost of the service call.

10. Credits. No credit or adjustment will be made for interruptions or degradations of the Service except as provided for in this Section. In the event of an interruption of the Service that continues for a period of twenty-four (24) hours or more, a credit allowance will be made for an amount not to exceed the prorated monthly charges for your Service during the affected period. The foregoing credit will be your sole and exclusive remedy for any interruption or degradation of the Service. To be eligible for any such credit, you must request the credit in writing within sixty (60) days of the commencement of the interruption or degradation. No credit will be available if the interruption period results from any Excluded Causes.

11. Network Management. You acknowledge that speed and bandwidth available to each computer or device connected to the network may vary for reasons including, but not limited to the number of users, computers or devices connected to the network, the amount of data being transferred over the network, and available bandwidth. You also agree that Clearwire retains the right, in its sole and absolute discretion, to employ network management activities including, but not limited to (i) reducing, limiting, or otherwise restricting uplink and downlink speeds and transfer rates, (ii) reducing or limiting peer-to-peer sessions during periods of high network congestion, (iii) preventing the delivery of spam, (iv) detecting malicious Internet traffic and preventing the distribution of viruses or other harmful code or content, and (v) using other tools and techniques to control bandwidth overuse. For further information, please refer to Clearwire's Acceptable Use Policy, available at www.clearwire.com/company/legal/aup.htm, which may be amended from time to time.

12. Acceptable Use Policy. The Acceptable Use Policy is incorporated into these Terms of Service as though they are part of it. Clearwire reserves the right to immediately restrict, limit, suspend, or terminate your Service or terminate this Agreement for any violation of the Acceptable Use Policy.

13. Privacy. Clearwire's Privacy Policy describes how Clearwire may collect and use your personally identifiable and other information, and is available at www.clearwire.com/company/legal/privacy.htm as may be amended.

14. Ownership; No Licenses. The Service and leased Equipment, and any firmware or software used to provide the Service, embedded in any Equipment, or used in connection with the Service (collectively "Software"); all Service information, documents and materials delivered to you by Clearwire or located on Clearwire's website (collectively "Information"); and all names, service marks, trademarks, trade names, logos and domain names (collectively "Marks") of Clearwire are and will remain the sole property of Clearwire and nothing in this Agreement grants you the right or license to use any of such Software, Information, or Marks except for your nonexclusive use of the Software and Information in connection with your personal use of the Service in accordance with the Agreement.

15. Tampering with the Equipment. You must not use with the Service any Equipment that has an altered electronic serial number or equipment identifier or any Equipment that has undergone a factory reset without the express written permission from Clearwire. In addition, you may not use with the Service any serviced,

altered, modified, stolen, or tampered Equipment, or permit any other person (unless authorized in advance by Clearwire in writing) to do so.

16. Theft of the Service or Leased Equipment. You must notify Clearwire immediately, in writing or by calling Clearwire Customer Care, if any leased Equipment is lost or stolen or if you become aware at any time that the Service is being stolen or fraudulently used.

17. Credit Reporting Agencies. You authorize Clearwire to ask consumer reporting agencies or trade references to furnish Clearwire with employment and credit information, and you consent to Clearwire's rechecking and reporting personal and/or business payment and credit history, as well as to enter this information in your file and disclose this information concerning you to appropriate third parties for reasonable business purposes. Upon receipt of adverse credit information about you at any time, Clearwire reserves the right to suspend or terminate Service to you or require a deposit for Service, at Clearwire's option.

18. Termination/Discontinuance of Service. Clearwire may suspend or discontinue providing the Service generally, or terminate your Service, either in whole or in part, at any time in its sole discretion. If Clearwire discontinues providing the Service generally or terminates your Service for a reason other than your breach of this Agreement, you will be responsible only for charges accrued through the date of termination, including a pro-rated portion of the final month's charges, and you will not be charged the Early Termination Fee.

19. DISCLAIMER OF REPRESENTATIONS AND WARRANTIES. THE ONLY WARRANTIES BEING MADE BY CLEARWIRE WITH REGARD TO THE SERVICE AND EQUIPMENT ARE THE EXPRESS WARRANTIES SET FORTH IN SECTION 8 OF THIS AGREEMENT. THE CLEARWIRE PARTIES (AS DEFINED BELOW) DISCLAIM ANY AND ALL OTHER REPRESENTATIONS AND WARRANTIES OF ANY KIND, EXPRESS, IMPLIED OR STATUTORY, INCLUDING BUT NOT LIMITED TO ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR USE, AVAILABILITY, NON-INTERFERENCE WITH YOUR ENJOYMENT OF THE SERVICE OR EQUIPMENT, OR NON-INFRINGEMENT. ANY STATEMENTS MADE IN ANY PACKAGING, MANUALS OR OTHER DOCUMENTS NOT EXPRESSLY INCORPORATED HEREIN, OR BY ANY CLEARWIRE EMPLOYEES OR REPRESENTATIVES, ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY AND NOT AS REPRESENTATIONS OR WARRANTIES OF ANY

KIND BY ANY CLEARWIRE PARTIES. CLEARWIRE DOES NOT AUTHORIZE ANYONE TO MAKE A WARRANTY OF ANY KIND ON CLEARWIRE'S BEHALF AND YOU SHOULD NOT RELY ON ANY SUCH STATEMENT. YOU ASSUME ALL RESPONSIBILITY AND RISK FOR USE OF THE SERVICE AND THE EQUIPMENT. THIS SECTION WILL SURVIVE THE TERMINATION OR EXPIRATION OF THIS AGREEMENT FOR ANY REASON. SOME STATES DO NOT ALLOW THE DISCLAIMER OF IMPLIED WARRANTIES, SO THE EXCLUSIONS IN THIS SECTION MAY NOT APPLY TO YOU IN WHOLE OR IN PART.

20. LIMITATION OF LIABILITY.

(A) IN NO EVENT SHALL ANY OF THE CLEARWIRE PARTIES BE LIABLE OR OBLIGATED IN CONNECTION THIS AGREEMENT, UNDER ANY THEORY, WHETHER IN CONTRACT, TORT, NEGLIGENCE, PRIVACY, SECURITY, STRICT OR PRODUCT LIABILITY, BREACH OF WARRANTY, OR OTHER LEGAL OR EQUITABLE THEORY: (I) FOR ANY AMOUNTS IN EXCESS OF THE AGGREGATE OF THE FEES PAID TO CLEARWIRE FOR THE APPLICABLE SERVICE OR EQUIPMENT HEREUNDER DURING THE THREE (3) MONTH PERIOD IMMEDIATELY PRECEDING THE OCCURRENCE GIVING RISE TO LIABILITY; (II) FOR ANY COST OF PROCUREMENT OF SUBSTITUTE GOODS, TECHNOLOGY, SERVICE, PRODUCTS, OR RIGHTS; (III) FOR ANY LOSS OR CORRUPTION OF DATA, DELAYED, DEGRADED OR INTERRUPTED USE OF THE SERVICE OR ACCESS TO THE INTERNET, OR DAMAGE TO ANY HARDWARE, SOFTWARE, OR THE SERVICE LOCATION; (IV) FOR ANY INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES AND/OR LOST PROFITS; (V) FOR ANY LACK OR BREACHES OF SECURITY OF THE SERVICE OR IN THE STORAGE OR INTEGRITY OF YOUR DATA OR ANY USER'S DATA; OR (VI) FOR ANY DAMAGES ARISING FROM ANY DELAY OR FAILURE IN PERFORMANCE DUE TO EVENTS OR CAUSES OUTSIDE CLEARWIRE'S REASONABLE CONTROL.

(B) THE EXCLUSIONS AND LIMITATIONS IN THIS SECTION SHALL APPLY WHETHER OR NOT CLEARWIRE WAS INFORMED OF THE LIKELIHOOD OF ANY PARTICULAR TYPE OF DAMAGES, AND EVEN IF ANY REMEDY FAILS OF ITS ESSENTIAL PURPOSE. IF YOU ARE DISSATISFIED WITH THE SERVICE OR EQUIPMENT OR IF YOU HAVE ANY OTHER DISPUTE WITH CLEARWIRE, OR CLAIM AGAINST CLEARWIRE, THEN YOUR SOLE AND EXCLUSIVE REMEDY IS TO DISCONTINUE USING THE SERVICE AND ANY LIABILITY WILL BE LIMITED TO THE RECOVERY OF YOUR DIRECT DAMAGES, LIMITED TO THE AMOUNT AND BY THE EXCLUSIONS SET FORTH IN THIS SECTION. THE

LIMITATIONS AND EXCLUSIONS IN THIS SECTION WILL SURVIVE THE TERMINATION OR EXPIRATION OF THIS AGREEMENT. SOME STATES DO NOT ALLOW THE EXCLUSION OR LIMITATION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, OR OTHER MODIFICATIONS OF OR LIMITATIONS TO CERTAIN REMEDIES, SO THE ABOVE EXCLUSION OR LIMITATION MAY NOT APPLY TO YOU, IN WHOLE OR IN PART.

21. Complaint Resolution/Notices. All complaints must be sent to Clearwire Customer Care at the address set forth at http://www.clearwire.com/company/contact.php or by calling 1.888.253.2794. Clearwire may require you to describe the complaint in writing. Written notices to you from Clearwire will be deemed given: (i) when sent to the email address specified on your Order Form, or such other email address previously designated by you, in writing at lease thirty days before the date of the notice, (ii) three (3) days following the date deposited in the U.S. Mail addressed to your last known address as kept in Clearwire's files, or (iii) the date of delivery or rejection when sent by a nationally recognized courier. You are responsible for notifying Clearwire of any changes in your email and/or mailing address. Written notice to Clearwire will be effective when directed to Clearwire's Customer Care Department and received at the address set forth at http://www.clearwire.com/company/contact.php. Except as provided in this Agreement, notices must be in writing to be effective. You also agree that all correspondence and notice sent to you by Clearwire, including account statements, account status, payment and billing information, and changes to terms of service may be sent by Clearwire electronically to the last email address provided by you.

22. Indemnification. You will defend, indemnify, and hold harmless Clearwire and its affiliates, the agents and suppliers of each, and any of their directors, officers, employees, agents, and shareholders and any other service provider or supplier (collectively, the "Clearwire Parties") against any and all claims, losses, damages, and liabilities arising from the use or misuse of the Service or Equipment by you or by any person you allow to use the Service or Equipment, or any breach of this Agreement by you or associated with Clearwire's installation of Equipment, including, but not limited to, claims by any owner of the Service location. You also agree to reimburse the Clearwire Parties and pay each Clearwire Party's reasonable attorneys' fees and costs related to defending such claims and related to enforcing this Agreement, including any such fees incurred in connection with any appeal. This section will survive termination or expiration of this Agreement for any reason.

23. Assignment and Successors in Interest. All of the provisions of this Agreement will be binding upon, inure to the benefit of, and be enforceable against your respective successors and permitted assigns. Except as specifically stated herein, you may not assign this Agreement or any of your rights, interests, or obligations without the prior written consent of Clearwire. Any such assignment without consent will be void.

24. Entire Agreement/Severability. This Agreement consists of these Terms and Conditions, the Phone Service Addendum, the Order Form, and your Service Plan (each as they may be amended from time to time) and represents the entire agreement and understanding of the Parties regarding the subject matter of this Agreement and supersedes all other representations, whether electronic written, or verbal, regarding the subject matter herein. In the event these Terms and Conditions are inconsistent with any document incorporated herein by reference or any other agreement between you and Clearwire, these Terms and Conditions will control unless Clearwire has expressly stated or agreed otherwise. In the event that a court of competent jurisdiction determines, in a final non -appealable judgment, that any provision of this Agreement is invalid, illegal, or otherwise unenforceable, such provision will be deleted and the remainder of this Agreement will remain in full force and effect and shall be enforced as nearly as possible in accordance with the stated intention of the parties

25. ARBITRATION; CHOICE OF LAW; STATUTE OF LIMITATIONS; JURY AND CLASS ACTION WAIVER. THIS AGREEMENT WILL BE GOVERNED BY THE LAWS OF THE STATE OF DELAWARE WITHOUT REGARD TO CHOICE OF LAW PRINCIPLES. ALL DISPUTES ARISING UNDER THIS AGREEMENT (OTHER THAN YOUR FAILURE TO MAKE PAYMENTS IN ACCORDANCE WITH THIS AGREEMENT AND ANY ACTION TO COLLECT AMOUNTS DUE TO CLEARWIRE UNDER THIS AGREEMENT, WHICH MAY BE BROUGHT IN ANY COURT OF COMPETENT JURISDICTION) WILL BE SETTLED EXCLUSIVELY BY BINDING ARBITRATION USING THE COMMERCIAL RULES OF THE AMERICAN ARBITRATION ASSOCIATION ("AAA") THEN IN EFFECT. THE PLACE FOR ARBITRATION WILL BE IN THE STATE WHERE THE SERVICE IS PROVIDED. ONE (1) ARBITRATOR SELECTED IN ACCORDANCE WITH THE AAA RULES WHO HAS EXPERTISE IN THE SUBJECT MATTER HEREOF WILL CONDUCT THE ARBITRATION. THE DECISIONS OF THE ARBITRATOR WILL BE BINDING AND CONCLUSIVE UPON ALL PARTIES INVOLVED AND JUDGMENT UPON ANY AWARD OF THE ARBITRATOR MAY BE ENTERED BY ANY COURT HAVING COMPETENT JURISDICTION. THIS PROVISION WILL BE

SPECIFICALLY ENFORCEABLE IN ANY COURT OF COMPETENT JURISDICTION. THIS DUTY TO ARBITRATE AND THE PROVISIONS IN THIS SECTION WILL SURVIVE THE TERMINATION OR EXPIRATION OF THIS AGREEMENT FOR ANY REASON. THE ARBITRATOR WILL NOT HAVE ANY AUTHORITY TO AWARD ANY SPECIAL OR PUNITIVE DAMAGES OR ANY OTHER DAMAGES EXCEPT AS PERMITTED BY THIS AGREEMENT. YOU AND CLEARWIRE WAIVE ANY RIGHT TO TRIAL BY JURY OF ANY CLAIMS OR DISPUTES RELATING TO THIS AGREEMENT OR THE SERVICE OR EQUIPMENT. NEITHER PARTY SHALL, AND EACH PARTY WAIVES ANY RIGHT TO, PARTICIPATE IN A CLASS ACTION (INCLUDING ANY CLASS ARBITRATION), EITHER AS A CLASS REPRESENTATIVE OR A CLASS MEMBER, ACT AS A PRIVATE ATTORNEY GENERAL, OR JOIN OR CONSOLIDATE CLAIMS WITH CLAIMS OF ANY OTHER PERSON. YOU AND CLEARWIRE AGREE THAT ANY CLAIM ARISING OUT OF OR RELATED TO THE SERVICE OR THIS AGREEMENT MUST BE COMMENCED WITHIN TWO (2) YEARS AFTER THE CLAIM ARISES, OR THE CLAIM WILL BE PERMANENTLY BARRED. NOTHING IN THIS AGREEMENT WILL PREVENT CLEARWIRE FROM SEEKING CONSERVATORY, PROTECTIVE OR INJUNCTIVE RELIEF WITH RESPECT TO A VIOLATION OF ITS INTELLECTUAL PROPERTY RIGHTS IN ANY COURT OF COMPETENT JURISDICTION PENDING THE OUTCOME OF THE ARBITRATION, OR ENFORCEMENT OR RECOGNITION OF ANY AWARD OR ORDER IN ANY COURT OF COMPETENT JURISDICTION. IN THE EVENT THAT ANY OF THE TERMS IN THIS SECTION 25 IS HELD TO BE IN CONFLICT WITH A MANDATORY PROVISION OF APPLICABLE LAW, THE CONFLICTING TERM OF THIS SECTION 25 SHALL BE MODIFIED AUTOMATICALLY TO COMPLY WITH SUCH PROVISION AND THE REMAINDER OF THIS SECTION 25 SHALL NOT BE AFFECTED.

APPENDIX F

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	§	
Truth-in-Billing and Billing Format	§	CC Docket No. 98-170
National Association of State Utility	§	
Consumer Advocates' Petition for	§	CG Docket No. 04-208
Declaratory Ruling Regarding Truth-in-	§	
Billing: Further Notice of Proposed	§	(FCC 05-55)Title
Rulemaking	§	

REPLY COMMENTS OF THE UNDERSIGNED ATTORNEYS GENERAL

TABLE OF CONTENTS

I. Introduction

On June 24, 2005, the undersigned Attorneys General filed initial comments regarding federal Truth-in-Billing regulations in response to the Federal Communications Commission's ("FCC" or "Commission") Second Report and Order, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, ("TIB Order 2").[1] In those comments, fifty-one Attorneys General, on the basis of their extensive experience with consumer complaints, investigations and enforcement actions related to telecommunications billing practices, offered substantial evidence to the Commission of significant consumer confusion related to misleading practices in billing for telecommunications services. The Attorneys General urged the Commission to (a) prohibit carriers from imposing "carrier add on charges"[2] to consumer bills since it is these add ons which undermine competition by making it virtually impossible for consumers to compare prices among providers; (b) in the alternative, submitted that if such are allowed, these line items should be clearly defined, accurately stated, separated from taxes and regulatory fees and not described as related to government charges, fees or taxes. Finally, the States urged the Commission to reject proposals which would preempt the States' role with respect to matters such as billing practices.

In this proceeding, wireline and wireless carriers submitted initial comments in which, generally speaking, they opposed any additional truth-in-billing regulations, strongly urged the Commission to issue a broad regulatory declaration preempting states, advocated for definitions of "mandated" and "non

---

[1] Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, CC Docket No. 98-170, FCC 05055, 2005 WL 645905 (rel. March 18, 2005).

[2] "Carrier add on charges" refers to charges which are determined by the carrier and are not taxes or regulatory fees expressly mandated by federal, state or local authorities. These add-on charges are to be distinguished from taxes and regulatory fees which federal, state, or local authorities require carriers to collect from consumers and remit to the appropriate governmental entity in association with the sale of telecommunications services.

mandated" charges consistent with their current billing practices, and almost uniformly opposed granting states enforcement authority under any rules which the Commission might adopt. These positions were based in part on the perspective that the current competitive market protects consumers, that additional rules will stifle competition and that carriers have adopted a voluntary code of conduct which addresses truth-in-billing and point of sale disclosure concerns. These comments, however, offered the Commission nominal, and in some instances, no legal analysis or factual support. For example, the comments favoring preemption of states neglected to even consider the strong anti-preemptive effect Section 601 of the Telecommunication Act of 1996 adds to already expressly limited preemption provisions and previously enacted savings clauses. Nothing submitted would serve to justify the FCC's departure from its well established approach, which recognized the effectiveness of joint state-federal actions in protecting consumers against deception and fraud in telecommunications.

In this reply, the States submit that comments filed demonstrate that (1) confusion over telecommunications bills is a significant problem that undermines competition; (2) the voluntary code adopted by some of the carriers fails to resolve billing problems; (3) preemption of state authority over billing practices is not supported in law; (4) the dormant commerce clause has no bearing on the preemption issue here, especially since Congress expressly provided that the states play a regulatory role; (5) any federal rules on point of sale disclosures must complement state authority; and (6) state enforcement authority is independent from federal authority and necessary in a competitive market.

The States submit that in today's pro competitive regime in which neither federal nor local agencies actively regulates rates by tariffed filings, Congress has recognized that states must play an even greater role in protecting consumers than in the past era of protective rate regulation. Contrary to views expressed by

the carriers in initial comments, the FCC has no authority to thwart Congress' intent in this regard.

II. Confusing Telecommunications Bills are a Significant Problem, Impede Customer Choice and Thwart Competition

A. There Is Ample Evidence That There Is a Problem with Billing Practices

In both the wireline and wireless contexts, the Commission has previously determined that there are significant problems with telecommunications bills. With respect to wireline services, in 1999, the Commission considered "an extensive record on both the nature and volume of customer complaints, as well as substantial information about wireline billing practices."[3] The Commission made a similar determination in the wireless context in 2005.[4]

Those findings are supported by the fact that the wireless industry is recognized as one of the top generators of customer complaints. In 2004, the Council of Better Business Bureaus received approximately 28,000 complaints about the wireless industry-*more than for any other industry*.[5] In 2004, the Commission itself received approximately 18,000 complaints about wireless carrier practices in the categories of "billing & rates" and "marketing & advertising."[6] Similarly, the States' experiences reflect that for the last five years, surveys of state Attorneys' General offices reflect that telecommunication related complaints rank in the top four of all consumer complaints.[7] Although some may argue that the

---

[3] 14 FCC Rcd.17090, ¶ 15 (1999).

[4] 20 FCC Rcd. 6448 ¶ 16 (2005).

[5] Initial Comments of AARP *et. al*, at 2 (June 24, 2005).

[6] *Id*.

[7] *See* Comments of Undersigned Attorneys General at 3 (June 24, 2005) ("AG Comments").

number of these complaints is minimal in comparison to the number of telephone subscribers, it is well established that only a small percentage of disgruntled consumers actually take the time to complain to a government agency.[8]

A primary reason for consumer complaints is undisclosed charges that appear on a wireless bill after the customer has become financially obligated to the service. According to market research conducted by TNS Telecoms, the average residential wireless consumer spends $17.75 per month more than the advertised price of the applicable monthly plan, and most of this amount is attributable to line items added to the bill by the carrier.[9]

This high level of consumer complaints and the nature of those complaints prompted a multi-state investigation by Attorneys General into misleading advertisements and deceptive practices in the wireless industry, which in 2004 resulted in the entry of settlement agreements between the Attorneys General of 32 states and three major wireless carriers.[10] Similarly, in May 2004, a bipartisan and overwhelming majority of the Minnesota Legislature passed the "Consumer Protections for Wireless Customers" statute based on numerous complaints that carriers unilaterally changed significant terms of service contracts without customer consent.[11]

B. A Representative Sample Wireless Bill Illustrates that Carriers Engage in Confusing Billing Practices

---

[8] *Id.*

[9] Reply Comments of Tracfone Wireless, Inc, at 6 (August 13, 2004).

[10] 20 FCC Rcd. 6448, ¶ 12 (2005).

[11] Brief of Minnesota Attorney General, *Cellco Partnership v. Mike Hatch*, United States Court of Appeals, 8th Circuit, No. 04-3198, pp. 6-8.

The current confusion in telecommunications bills can be illustrated by analyzing a sample bill. The sample bill analyzed below was included with comments filed by Leap Wireless International, Inc.[12] This bill reflects a charge for "MONTHLY SERVICE" of $44.99. However, there is an additional "MONTHLY CHARGE" for "REGULATORY RECOVERY" in the amount of $0.45. These two line items are added together to compute the "MONTHLY CHARGES," which total $45.44. This amount, however, is not what the customer is required to pay.

Eight other line items are added to the "MONTHLY CHARGES" to compute "CURRENT CHARGES." The first four of these line items are for taxes and immediately following these four line items for taxes, four more line items are added:

(1) $0.50 charge for "AR WIRELESS 911 SURC;"
(2) $0.43 charge for "AR UNIVERSAL SERVICE;"
(3) $0.16 charge for "FEDERAL USF FEE;" and
(4) $0.02 charge for "FED REGULATORY FEE."

These eight line items are added to the "MONTHLY CHARGES" for a "CURRENT CHARGES" total of $51.31 but this amount is not what the customer is required to pay. In addition to the "MONTHLY SERVICEFEE," "MONTH REGULATORY RECOVERY CHARGE" and the eight line items described above, the bill lists additional "FEES" including a $0.55 "PAPER BILL FEE" which in this case is added to a $15.00 "REINSTATEMENT FEE" to compute all "FEES." Thus, the "AMOUNT DUE" total which the customer must pay is, in fact, $84.20.

Further confusion is caused by the fact that a consumer reviewing this bill could reasonably assume incorrectly that any or all of the four line items listed immediately after line items for taxes are themselves

---

[12] Comments of Leap Wireless International, Inc., Attachment (July 14, 2004) (Leap Wireless Comments).

taxes which the carrier is required to collect from the consumer and remit to the government. That suggestion is made by listing these four line items immediately after line items for actual taxes. Similarly, the $0.45 regulatory recovery charge easily could appear incorrectly to be a 1% tax on the monthly service charge of $44.99.

The States submit that this sample bill is confusing and typical of bills of other carriers. Arguments that there is no problem with billing in the telecommunications industry ignore the reality reflected in these types of widely accepted billing practices.

C. Customer Confusion Over Bills Is Harmful to the Development of a Competitive Market.

The problem of confusing telecommunications bills is harmful to competition by making price comparisons cumbersome and difficult for consumers. Consider the range in charges imposed by five leading wireline and wireless carriers for recovery of regulatory compliance as listed on Table 1. The largest amount of $2.83 charged by Nextel in certain markets is over six times higher than the charge of $0.45 imposed by Leap Wireless for recovery of regulatory compliance.

These carrier add-on charges for some (but not all) of the carriers' costs of doing business are in addition to the carriers' charges for services. Therefore, the charges for services are artificially understated by different amounts for different carriers. Consumers cannot compare service offerings and prices to make decisions; they also must consider these and numerous other line items for which they as consumers receive no services or goods in return. Meaningful price comparisons are extremely difficult for consumers in this environment, and the confusion undermines the potential benefits of competition.

Table 1 - Comparison of Regulatory Compliance Charges Imposed by Leading Telecommunications Carriers

Carrier	Name of Charge	Amount per Month
Leap Wireless International, Inc.[13]	Regulatory Compliance Fee	$0.45
BellSouth Corporation[14]	Carrier Cost Recovery Fee	$0.99
AT&T Corp[15]	Regulatory Assessment Fee	$0.99
Cingular Wireless LLC[16]	Regulatory Cost Recovery Fee	Up to $1.25
Nextel Communications Inc.[17]	Federal Programs Cost Recovery Fee	Between $1.55 and $2.83

Rational billing in a competitive retail market should be easily understood. The telecommunications market should not be encumbered by the confusing practice of artificially understating the charge for services and then adding line items for some of the carrier's costs of doing business.

D. Unnecessary Information Gaps Prevent Customer Choice and Lead to Market Inefficiency

There are many specific problems associated with confusing telecommunications bills. One problem is that the bills are so cumbersome that consumers have difficulty simply understanding the actual

[13] Leap Wireless Comments at 12 (July 14, 2004).

[14] BellSouth Corporation's Opposition to Petition at 9 (July 14, 2004).

[15] AT&T Corp. Opposition at 5 (July 14, 2004) (AT&T Opposition).

[16] Opposition to Petition of Cingular Wireless LLC at 8 (July 14, 2004).

[17] Comments to Nextel Communications, Inc. And Nextel Partners, Inc. at 6 (July 14, 2004).

charge for services. Then, some of the line items are given descriptions that could be interpreted as taxes on consumers, when in reality they are not. Beyond this is the lack of accountability as to whether the amounts collected by carriers for specific line items actually equal these costs of doing business purportedly passed through to consumers. Consumers do not confront similar problems when purchasing milk from the grocery store or a haircut from a barber, and there is no rational economic reason to preserve these problems in the market for telecommunications services.

The telecommunications market is further characterized by practices that inhibit the ability of consumers to change service providers, a condition which further detracts from the ability of competition alone to solve these information problems.

In the wireless industry, in particular, consumers are often locked into purchasing services from a specific carrier by long-term contracts that include substantial early termination fees, some as high as $240.[18] If after entering into a contract, the customer learns that his provider will requirement payment of previously undisclosed charges that a competing provider would not impose, the customer would still not change providers because it would mean incurring early termination penalties much greater than the potential savings from switching carriers. Even if the customer pays the early termination penalty to change carriers, the new carrier could amend the agreement by adding or increasing discretionary line item charges. For instance, AT&T Corp. imposed the $0.99 per month Regulatory Assessment Fee unilaterally on its customers effective July 1, 2003.[19]

Thus, there is a combination of factors that have led to deception and confusion of consumers in

---

[18] Cingular Wireless LLC Opposition to Petition, attached Wireless Services Agreement (July 14, 2004).

[19] AT&T Opposition at 5 (July 14,2004).

the telecommunications industry, including factors such as: (1) confusing bills and misleading line items; (2) failure to fully and fairly disclose all charges at the point of sale; (3) the practice of carriers adding or amending charges and other terms and conditions after the customer has purchased the service; and (4) imposition of early termination penalties for cancellation of service before the end of the contract term. As a result of the interplay between these factors, customers cannot fairly compare between carriers, and cannot accurately compare rates at the time of purchase. Under these circumstances, a truly competitive market cannot function.[20]

Consequently, the real issue in this proceeding is not rate regulation – the States agree that carriers should be able to charge whatever rates the market will bear. The real issue is the proper disclosure of rates and charges, and of unilateral changes in terms and conditions that impact the charges customers must pay. These disclosure issues fall within the ambit of state consumer protection statutes, and implicate the regulation "terms and conditions" of service which fall under state jurisdiction under 47 U.S.C. §332(3)(a) in the case of wireless carriers, and state specific utility regulatory statutes in the case of wireline carriers.

E. Pricing in the Current Telecommunications Industry Is Inconsistent with Truth-In-Billing Regulations

The practice of adding line items for selected costs of doing business separate and apart from the

---

[20] To illustrate this point, consider the following example. If a consumer attempts to compare and contrast the wireless plans of Carrier A and Carrier B, Carrier A might charge $25 per month for service while Carrier B charges $27 per month for service. However, Carrier A might have five carrier add-on charges that total $4 per month, while Carrier B has two carrier add-on charges that total $1 per month. Although the service plan offered by Carrier A appears on the surface to be cheaper, in reality Carrier B's plan is cheaper. If the customer somehow figures out the reality of the cost comparison, he or she would have to pay Carrier A an early termination fee of say $100 to terminate the two-year contract in order to save $1 per month. Then if the customer actually pays the $100 to terminate the contract with Carrier A and signs a new two-year contract with Carrier B, Carrier B might raise its carrier add-on charges to $5 per month, pursuant to a one-sided contract provision that permits the carrier to raise its carrier add-on charges during the term of the contract. In order to switch carriers again, the customer would have to pay an early termination fee of say $150 to Carrier B. A truly competitive market cannot function in this environment.

price for services is inconsistent with 47 C.F.R. § 64.2401(b):

> Descriptions of billed charges. Charges contained on telephone bills must be accompanied by a brief, clear, non-misleading, plain language description of ***the service or services rendered.*** The description must be sufficiently clear in presentation and specific enough in content so that customers can accurately assess that ***the services for which they are billed*** correspond to those that they have requested and received, and that the costs assessed ***for those services*** conform to their understanding of the price charged. (Emphasis added).

The clear underlying assumption of this regulation is that telecommunications carriers should bill their customers for services. There is no provision in this regulation for billing customers for selected costs of doing business. The underlying assumption of this regulation, i.e., that carriers should bill their customers for services, is consistent with rational billing in a competitive market.

Taxes and similar fees that the government requires the carrier to collect from consumers and remit to the government are different. Consumers understand the concept of paying taxes and similar fees to the government in the form of additional charges on their bills. It is this same consumer understanding about taxes, however, that causes confusion when line items are added that are not for services, goods, or taxes on consumers. If telecommunications bills included only charges for services and goods plus additional line items for taxes and similar fees that the government requires the carriers to collect from consumers and remit to the government, the ability of consumers to compare prices and service offerings would be significantly enhanced, and competition would benefit.

III. CTIA Consumer Code Fails to Resolve the Problem of Confusion Over Billing Practices and Is Unenforceable

Some carriers argue that the Commission need not regulate wireless carriers because many now

have agreed among themselves to voluntarily abide by the CTIA's Consumer Code for Wireless Service.[21] The CTIA Code is an unenforceable set of industry goals meant to forestall comprehensive regulation of consumer rights in transactions with wireless carriers.[22] Any suggestion that the CTIA Code acts as an effective deterrent to protect consumers against wireless carriers' misleading billing practices and failures to disclose all charges for service at the point of sale can be countered by the simple recognition that the Code is, at best, aspirational and in no way enforceable. CTIA's assertion that competition will assure compliance with the Code is undermined by the fact that wireless carriers continue to engage in practices that mislead and confuse consumers as explained in the Attorneys' General initial comments.

The States further note that the CTIA Code includes only one recommendation which touches on billing practices – found in the sixth point of the Code. That point provides that carriers must distinguish between "monthly charges for services and features and other charges collected and retained by the carrier" and "taxes, fees and other charges collected by the carrier and remitted [to government]" and suggests that carriers are not to label cost recovery fees directly as taxes.[23] There are no requirements regarding the manner in which those charges are to be distinguished and, as is clear from the examples set forth in these reply comments, carriers' bills which are purportedly in compliance with the voluntary code remain confusing.

---

[21] CTIA is an organization of the wireless communications industry and includes wireless carriers and manufacturers. *See* Nextel/T-Mobile Letter, December 13th, 2004, at 5; *See also* Cingular Wireless Comments at 3; CTIA Comments at 2; T-Mobil Comments at 4. The CTIA Consumer Code for Wireless Service is available at http://www.CTIA.org/wireless_consumers/consumer_code/index.cfm (hereinafter "CTIA Code").

[22] Tech Law Journal Daily E-Mail Alert, September 12, 2003, Alert No. 738, *CTIA Announces Voluntary Consumer Code for Wireless Carriers.* Report is available at http://www.techlawjournal.com/alert/2003/09/12.asp.

[23] CTIA Code at 2.

This aspirational code falls short in several other respects, including disclosures. That is, while the code provides for disclosure of certain enumerated information about rate plans, it limits such disclosures to "new" consumers. Further, it provides that such material should be disclosed to consumers "in collateral or other disclosures at the point of sale," but fails to require clear and conspicuous notice of these disclosures. Finally, the CTIA Code does not require that the disclosures be made prior to customers signing a contract to ensure that consumers can act as informed participants in the market.

Most fundamentally, the CTIA Code, because it is voluntary, is unenforceable by any aggrieved party. Thus, while adoption of such a voluntary industry code may be a helpful *addition* to necessary legal standards and enforcement authority, it neither provides the protection that could be afforded from adoption by the Commission of meaningful truth-in-billing or point of sale disclosure rules, nor provides a basis to preempt states from doing so.

IV. States Have Power and Responsibility to Regulate Carrier Billing Practices, Congress Has Not Preempted That Authority, and Has Precluded its Implied Preemption

A. Carriers Ignore or Discount the Language of the Statute and Its Clear Purpose, Against the Guidance of Congress and the Courts

Carriers' arguments in favor of a preemptive declaration by the Commission[24] require that the agency disregard the law's plain language, obvious purpose, and legislative history. The bold declaration that the carriers seek is beyond the Commission's authority, contrary to the result Congress intended, and violates important rules of constitutional interpretation and statutory construction.

---

[24] *See, e.g.*, Comments of Cingular Wireless, LLC, at 34 (June 24, 2005) (Cingular Comments).

1. Congress Clearly Intended Neither to Preempt in This Area Nor to Confer Broad Preemptive Power on the Commission

Because the statutes at issue so clearly contemplate continued state regulation of billing practices, carrier comments have largely sidestepped the actual language of these statutes. Instead, they present general policy arguments based on their view of what would promote competition. Their claims of how those policies should be effectuated either ignore the history and context of the law or rely on unsupported and illogical readings of the statute and legislative history. Such arguments in favor of a broad Commission declaration of preemption in areas in which Congress expressly provided for continued state regulatory and enforcement authority would have the FCC act improperly and contrary to law.

2. Rather than Broadly Preempting the States from Regulating in this Area, Congress has Preserved State Authority and Precluded Implied Preemption

In arguing that the Federal Communications Act ("FCA") of 1934, 47 U.S. C. § 151 et seq. ("FCA")[25] somehow provides or allows for preemption of state law with respect to billing practices, and, further, that passage of the Telecommunications Act of 1996 ("Telecommunications Act")[26] somehow evinces an intent by Congress to adopt a policy that could result generally in the removal of state regulation that govern such practices, carriers misconstrue the nature, language, purposes and history of the FCA. In fact, Congress has repeatedly and expressly acknowledged and endorsed the States' continuing role in

---

[25] Title I, § 1, 48 Stat. 1064, as subsequently amended.

[26] Pub. L. 104-104, 110 Stat. 56.

regulating carriers with respect to matters such as billing practices.[27]

As detailed in the AG Comments, States have historically had power to regulate terms and conditions under which telecommunications carriers do business in their jurisdictions, including practices in billing consumers for services.[28] They were constrained only by judicial determination grounded in the filed rate doctrine and by judicial determination, made sparingly and with reluctance, of actual conflict between state law and Commission regulation authorized by the FCA.[29] As demonstrated in the record, regulatory proceedings, law enforcement actions, and private cases brought under state law have remedied numerous carrier billing problems and brought relief to hundreds of thousands, if not millions of consumers.[30] In fact, not only does the FCA not contemplate general preemption of state regulation of such carrier practices, it expressly prohibits the FCC itself from regulating in the field of intrastate telecommunications except under limited circumstances prescribed in the FCA.[31]

Congress evinced its intent not to preempt states in the field of telecommunications regulation, nor to authorize any broad preemption, through the savings clause included in the FCA, codified at 47 U.S.C. § 414. Congress further cemented this view in more recent amendments to the FCA and in the Telecommunications Act through repeated and enhanced recognition and preservation of state authority, except where it expressly provided otherwise.

---

[27] AG Comments at 15-18.

[28] AG Comments at 14-15.

[29] AG Comments at 23-25, 27-29.

[30] AG Comments at 14-15.

[31] 47 U.S.C.A. § 152(b); see *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 360 (1986).

3. Carrier Comments Fail to Rebut That the 1993 OBRA[32] Amending Section 332 Provided Only for Limited Preemption, With Respect to State Regulation of Rates and Entry, and Only for CMRS Carriers

In 1993, when it added Section 332(c) to the FCA, 47 U.S.C. § 332(c), Congress expressly and narrowly provided that, with respect only to certain wireless telecommunications services ("CMRS"), the FCC would have exclusive jurisdiction over regulating the "rates and entry" of CMRS carriers, whether providing intrastate or interstate service. Congress made clear, however, that the states retain their traditional regulatory authority over CMRS carrier "terms and conditions." The 1993 OBRA did not otherwise broaden the FCC's jurisdiction, nor limit the regulatory authority of the states. In no respect did the 1993 OBRA empower the Commission either to broadly declare its occupation of a field or to specifically review state laws or regulations to determine the preemptive effect of the FCA or of its own regulations. Indeed, the narrow area in which Congress gave the FCC to regulate wireless carriers was expressly and unambiguously limited to rates and entry.[33] As explained below, the sweeping declaration of preemption urged by carrier comments is not justified by the language or purpose of the statute.

4. The Sweeping Preemptive Declarations Now Urged On The Commission Were Precluded By Congress In The Telecommunications Act

The inclusion of a pro-competitive purpose as one of the purposes of the Telecommunications Act does not override its express anti-preemptive provisions. In the Telecommunications Act, as discussed in AG Comments, Congress precluded the FCC from adopting preemptive declarations governing state rules

---

[32] The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 ("1993 OBRA").

[33] 47 U.S.C. § 332(c).

in areas, such as billing practices, in which state power was preserved in the statute.[34] Where the Telecommunications Act did preempt states from some regulation, it did so only in limited circumstances that do not justify the preemption urged by carriers in this proceeding. In doing so, Congress took great care to preclude the kind of preemptive declaration now contemplated.

5. In Section 601, Congress Barred Any Interpretation of the Telecommunications Act That Would Preempt State Authority Where Not Expressly Preempted By the Statute

In the Telecommunications Act, Congress went beyond the existing savings clauses to express clearly its intent that the Telecommunications Act not be construed to imply any preemption. In Section 601(c)(1), which Congress labeled "No Implied Effect,"[35] Congress stated that the Telecommunications Act and its amendments "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." The plain meaning of this statutory language leaves no room for interpretation. Yet, for anyone who might doubt the meaning or purpose of that language, the legislative conference report spoke directly to the provision and in a manner wholly consistent with the States' reading. As the report stated:

> The conference agreement adopts the House provision stating that the bill does not have any effect on any other Federal, State, or local law unless the bill expressly so provides. *This provision prevents affected parties from asserting that the bill impliedly preempts other laws.*[36]

---

[34] AG Comments at 15-17.

[35] 104th Congress Report of House of Representatives 2d Session 104-458, Telecommunications Act of 1996, Conference Report at p. 92.

[36] 104th Congress Report of House of Representatives 2d Session 104-458, Telecommunications Act of 1996, Conference Report at p. 201 (emphasis added).

Congress was clear. The Telecommunications Act contained provisions providing expressly for preemption of limited subject matter, scope and circumstances. No other or further preemption is implied.

In case law under the Telecommunications Act, courts have held precisely that. As a result of the copious manner in which Congress expressly provided for preemption in some respects and preserved state authority in others, and Section 601's clear prohibition of any construction of the Telecommunications Act implying preemption where Congress did not itself expressly preempt, courts have found that implied preemption under the Telecommunications Act is precluded.

In *Verizon Communications, Inc. v. Trinko*, 540 U.S. 398 (2004), the Supreme Court examined the antitrust-specific clause in Section 601(b)(1), which contains language that mirrors the more general prohibition against construing the Telecommunications Act to imply preemption set forth in Section 601(c). The Supreme Court rejected a claim that the Telecommunications Act must be implied to immunize parties from enforcement of antitrust law for conduct regulated by the Commission under the Telecommunications Act. The Court noted that, "[i]n some respects the enforcement scheme set up by the 1996 Telecommunications Act is a good candidate for implication of antitrust immunity, to avoid the real possibility of judgments conflicting with the agency's regulatory scheme."[37] But the Court found that with Section 601(b), "Congress . . . precluded that interpretation."[38]

---

[37] *Verizon Communications, Inc. v. Trinko, supra,* 540 U.S. at 406.

[38] *Id.; See also Covad Communications Co. v. Bellsouth Corp.*, 374 F.3d 1044 (11th Cir. 2004) (noting that *Verizon Communications, Inc. v. Trinko*, 540 U.S. 398 (2004), endorsed the prior Covad decision which had been vacated on other grounds, stating that "the FTCA savings clause barred a finding of implied antitrust immunity" and noting that the savings clause was expressly meant to co-exist with the Sherman Act); (prior decision was *Covad Communications Co. v. Bellsouth Corp.*, 299 F.3d 1272, 1280-81(11th Cir. 2002), *vacated* on other grounds (finding that where Congress expressly preserved in the Telecommunications Act the application of other law, there can be no "plain repugnancy" between the two such that the Act should be read to imply preemption of the other).

More recently and in a case directly involving survival of state authority in the face of FCC regulation, the Fourth Circuit has found that Section 601, coupled with the FCA's more general savings clause, 47 U.S.C. § 414, "counsel against any broad construction" of the Telecommunications Act's goals that would imply state law preemption.[39] The Fifth Circuit has also found that Section 601(c)(1) precludes the Commission from declaring preemption of state authority under the Telecommunications Act in an area not expressly preempted by Congress holding that "Section 601 precludes a broad reading of preemptive authority."[40]

The cases on which carriers rely to argue that the Commission should by edict declare sweeping preemption fail to consider the impact of Section 601. In fact, Section 601 further serves to strengthen the requirements for strict adherence to Congress' express delimitation of preemption in Section 253 as discussed in the following section.

6. Section 253 Does Not Allow the Commission to Proclaim Preemption of State Regulation of Carrier Billing Practices

In Section 253, where the Telecommunications Act provides for some preemption, Congress took care in at least four important ways to preserve state regulatory authority and to preclude Commission preemption of state authority in areas, such as those addressed in this proceeding, outside of what was

---

[39] *Pinney, M.D., v. Nokia, Inc.*, 402 F.3d 430, 458 (4th Cir. 2005) (holding state law claims regarding wireless telephones themselves not to be preempted by the FCA or by FCC regulation).

[40] *City of Dallas v. F.C.C.*, 165 F.3d 341 (5th Cir. 1999) (reversing FCC rule that violated "plain meaning" of statute by preempting state franchise requirements for cable television open video system operators on theory that such requirements conflicted with congressional purposes) (holding that Section 601 "precludes a reading of preemptive authority" under the Telecommunications Act and also finding inappropriate any Chevron deference to the agency, because in that provision, Congress "already has resolved the issue of preemption.").

intended in the statute.

First, Congress expressly described the limited circumstances under which the Commission could preempt state authority under the Telecommunications Act.[41] Section 253, which Congress entitled "Removal of Barriers to Entry,"[42] declares that "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[43] Notably, the provision confines the scope of preemption to state authority that prohibits or has the effect of prohibiting telecommunications service. The provision, unlike the preemption of state authority in Section 332, does not even speak to rates, which carriers, as they must to make any argument, contend are at issue here. Section 253 only affects regulation of barriers to entry, clearly not an issue here. And, as discussed in AG Comments, unlike language used by Congress when it may want to preempt more broadly, the provision does not purport to encompass state authority "related to" the subject of preempted matter in Section 253(a).[44]

Second, Congress expressly made clear that even the preemption authorized in Section 253 does not generally extend to encompass state "requirements necessary to preserve and advance universal

---

[41] 47 U.S.C. § 253(a).

[42] 104th Congress Report of House of Representatives 2d Session 104-458, Telecommunications Act of 1996, Conference Report at p. 16.

[43] 47 U.S.C. § 253(a).

[44] AG Comments at p. 17; *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 377; see also *Total TV v. Palmer Communications, Inc.*, 69 F.3d 298, 302 (9th Cir. 1995) (explaining that the phrase "to regulate" "is associated with a more limited preemptive intent," whereas the phrase "related to regulation" "signifies a broad preemptive purpose sufficient to preempt state laws of general application"); *Cable Television Association of New York, Inc. v. Finneran*, 954 F.2d 91, 101 (2nd Cir. 1992) ("Where Congress has intended to pre-empt all state laws affecting a particular subject, it has employed language well suited to the task . . . . The courts have consistently interpreted the words 'relate to' in broad, common sense fashion. . . .").

service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[45] Thus, even some state regulation that could otherwise have prohibitive effect and violate Section 253(a) could not be preempted if expressly saved by Section 253(b).

Third, Congress plainly did not contemplate broad preemptive declarations of the kind now being suggested to the Commission. The statute itself states that any preemptive order be limited "to the extent necessary to correct" the anti-entry violation.[46]

And fourth, as discussed above, as provided in Section 601 of the Telecommunications Act, and reiterated in its contemporaneous Conference Report, Congress specifically precluded any interpretation implying preemption beyond the bounds of the statute's express preemptive language.

7. Other Authority Cited By Carriers Provides No Express Preemption And Offers No Support For Implied Preemption Of State Regulation Of Carrier Billing Practices

Carriers cite a grab-bag of other sections of the law in arguing that preemption of carrier billing practices was somehow intended or implied under the Telecommunications Act, or is in some way necessary to effectuate the law's purposes. As explained in AG Comments[47] and further described above, such a determination would be contrary to Congress' clear intent and is not supported in the cited statutory provisions.

Some carriers have cited Section 2(b) of the FCA, 47 U.S.C. § 152(b), but that section actually

---

[45] 47 U.S.C. § 253(b).

[46] 47 U.S.C. § 253(d).

[47] AG Comments at 14-26.

is a savings clause that prohibits the Commission from regulating intrastate services. It does not preempt; nor does it authorize preemption in any area.[48]

Carriers also point to Sections 201, 202 and 205 for authority that they give to the Commission to rule on whether carrier rates and other practices for interstate communications services are "just and reasonable."[49] These provisions, however, have no effect on state protection of consumers or regulation of intrastate services; nor do they trump the manner in which Section 332 allows for state regulation of terms and conditions for CMRS carriers, while preempting only state regulation of CMRS rates and entry.[50]

8. Section 332 of the FCA Expressly Preserves State Authority to Regulate CMRS Terms and Conditions, Which Congress Certainly Understood to Encompass Matters Including But Well Beyond Carrier Billing Practices

Some carriers argue that the FCC should establish regulations under Section 332 that purport to preempt the States well beyond what Congress regarded as the area intended for preemption in the 1993 OBRA.[51] As the Commission has acknowledged, Congress explained that its intent in leaving intact under Section 332 state authority to regulate "other terms and conditions" of CMRS, encompassed at least "such matters as customer billing information and practices and billing disputes and other consumer protection matters . . . or such other matters as fall within a state's lawful authority."[52] In fact, in using the expansive

---

[48] *See, e.g.*, Sprint Comments at 4 (June 24, 2005); Cingular Comments at p. 6.

[49] *See, e.g.*, Comments of Cingular at 8-9, 27 (citing to sections 201, 202 and 205) (June 24, 2005); Comments of Verizon Wireless, at 27 (citing to section 201) (June 24, 2005) (Verizon Wireless Comments); Comments of CTIA - The Wireless Association™, at 36, 42 (citing section 201(b)) (June 24, 2005) (CTIA Comments).

[50] AG Comments at p. 25.

[51] *See* Nextel Comments at p. 26-27.

[52] TIB Order 2 at Paragraph 32, quoting H.R. Rep. No. 111, 103d Cong., 1st Sess., at 261 (1993).

language in the Conference Report to describe what it meant, at a minimum, by reference to "terms and conditions" in Section 332, Congress clearly indicated its broad expectation of the role that state authority would play in CMRS regulation. As discussed in detail in AG Comments, "rates" are "rates" and, as courts have held, rates clearly cannot be understood to encompass the entire relationship between consumers and carriers, particularly in the context of clear contrary language in the statute.[53]

The suggestion that the FCC should preempt state authority despite the clear congressional intent, language of the statute, and savings clauses that are directly inconsistent with preemption of state billing practices is improper and should be rejected. While some comments focus on the preemptive effect of an agency's action within the scope of its delegated authority,[54] that authority does not extend to allow the Commission to pass regulations that are directly contrary to the language and obvious purpose of the statute. The Supreme Court has previously rejected arguments that, contrary to statutory limits to its authority, the Commission can nevertheless "take action which it thinks would best effectuate a federal policy. An agency may not confer power upon itself."[55] "To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant the agency power to override Congress."[56]

---

[53] AG Comments at 17-19.

[54] *See, e.g.*, CTIA Comment at 37, Verizon Comment at 16, Cingular Comment at 7, Nextel Comment at 21, T-Mobile Comment at 16 (June 24, 2005), SBC Comment at 11 (June 24, 2005), and Coalition for a Competitive Telecommunications Market Comment at 2 (Junee 24, 2005) (CCTM Comments).

[55] *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 335, 374 (1986).

[56] *Id.*; *See also American Libraries Association v. FCC*, 406 F.3d 689, 708 (D.C. Cir. 2005) (rejecting FCC's assertion of authority in area related to but outside that delegated to it by Congress as "an extraordinary position," in which the court found the agency claimed "*plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area") (emphasis in original, citations omitted).

As the *Pinney* court found, examining Section 332, "in pursuing its objective of ensuring the availability of a nationwide network of wireless service coverage, Congress has been very careful to preempt expressly only certain areas of state law, preserving the remainder for state regulation."[57] That intent should not be ignored or circumvented.

In short, as detailed in AG Comments, because Section 332 proscribes state regulation only with respect to rates and entry and specifically preserves state authority to regulate CMRS in other areas, it does not authorize the Commission to reach out and declare a broader preemptive scope or to redefine terms Congress meant one way to mean something different.[58]

B. Congress' Careful Delegation Of Only Limited Authority to the Commission and the Many Express Savings Clauses Throughout Chapter 5 Of Title 47 Preclude Any Implied Preemption Or Declaration By the FCC That it Occupies the Field of Carrier Billing Practices

Despite carrier assertions to the contrary,[59] what Congress enacts, and what it means, always matter in determining whether state power is preempted by federal law or regulation. In cases arising under statutes in which Congress expressly preempts to some extent, but reserves state authority, the Supreme Court has repeatedly examined whether Congress intended to preempt state law directly or to provide agency authority to preempt. Thus, in *Cipollone v. Liggett Group, Inc.*, the Court found that, because Congress had declared the extent of preemption in the statute at issue, the scope of preemption was

---

[57] *Pinney*, *supra* note 39, at 458.

[58] AG Comments at 17-21.

[59] CITA Comments at 42.

governed by the express statutory language.[60] The Court explained:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation.[61]

Applying *Cipollone*, the Commission should not broadly preempt state regulation of carrier billing practices because Congress clearly did not intend such preemption, and preemption should not be implied given the explicit applicable statutory language regarding the areas in which state law is either preempted or preserved.

For several reasons, the holding in *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000) does not alter that analysis. First, in *Geier* the Court found preemption based on its finding of actual conflict between enforcement of substantive federal safety regulations and the state law claims asserted by the plaintiffs.[62] The holding does not disturb the proposition that there can be no implied field preemption where Congress expressly reserves the application of state law within the field. Second, *Geier* did not involve questions about the agency's authority to issue the regulations at issue. And third, while stating in *Geier* that the presence in the statute of preemption language coupled with a general savings provision did not necessarily preclude implied preemption, the Court did not simply ignore the savings clause. It considered the language of the provision and determined that it did not evince congressional intent to

---

[60] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

[61] *Id.* (internal citations omitted).

[62] *Geier* at 874.

preserve the state law action brought by plaintiffs in that case. The language and context of the provisions at issue in *Geier* contrast mightily with the clear and express language at issue now. There was no language in the savings clause at issue in *Geier* that remotely approached what Congress provided in preserving a particular state regulatory role under Section 332 of the FCA, as discussed in AG Comments and in this reply comment. Certainly, Congress had not, in the statute at issue in *Geier*, expressly commanded that no preemption be implied from its enactment, as it did with Section 601 for the Telecommunications Act.

Nor, as asserted by carriers, does the Court's opinion in *Fidelity Savings and Loan Assoc. v. De la Cuesta*, 458 U.S. 141 (1982) offer a proper path to the Commission's proposed preemption by regulation of state authority expressly preserved by Congress in the FCA.[63] In *De la Cuesta*, although there were some state law savings provisions in the statutory scheme, the Court found, unlike in the statutes at issue in this proceeding, no specific savings clause applicable to the kind of state law subject to the agency's preemption. The *De la Cuesta* Court did not have before it any provision like that in Section 601 expressly declaring congressional intent to preclude implied preemption.

Carriers put much reliance on *City of New York v. F.C.C.*, 486 U.S. 57 (1988), and its holding that the Commission did not act improperly in preempting state and local technical standards governing cable television signals. *City of New York*, however, was decided under Section 624(e) of the Cable Communications Policy Act of 1984, codified at 47 U.S.C. §544. The Court determined in *City of New York* that Section 624 of the Cable Act had expressly provided for the Commission to adopt rules preempting in that area, and found in detailed analysis of the Cable Act and its legislative history that such

---

[63] CTIA Comments at 40, nt. 105; Sprint Comments at 8, nt. 30; and Verizon Wireless Comments at 21, notes 65 and 67.

preemption was entirely consistent with what Congress had intended in passing that statute.[64] *City of New York* ultimately provides not for the broad preemptive authority that the Commission would need to override congressional intent, but for the kind of focused consideration of congressional language and purpose that carriers seeking such preemption would sidestep in this proceeding. The Court's conclusion in that case, that it could "find nothing in the Cable Act which leads [the Court] to believe that the Commission's" decision to preempt was contrary to congressional intent,[65] is not one that could be made on the matters at issue in this proceeding. Congress clearly has intended there be no preemption of state regulation of matters such as carrier billing practices, as discussed elsewhere in AG Comments and in this comment.

Section 332 plainly preserves state CMRS regulation that does not set rates or prevent market entry, including any other "terms and conditions." As argued elsewhere in AG Comments and this comment, Congress meant to include within that broad savings clause the kinds of regulation that the Commission now contemplates preempting.[66] And, as the Fifth Circuit Court of Appeals stated, in *City of Dallas v. F.C.C.*, any claim that the Telecommunications Act confers authority on the FCC to preempt state law that is outside the carefully defined areas in the Act where Congress expressly preempted a role for states is explicitly precluded.[67]

---

[64] 486 U.S. at 66-69.

[65] *Id.* at 69.

[66] AG Comments at 17-19.

[67] 165 F.3d 341, 348 (5th Cir. 1999) (holding that Section 601(c) "precludes a broad reading of preemptive authority" under the Telecommunications Act, and also finding inappropriate any *Chevron* deference to the agency, because in that provision, Congress "already has resolved the issue of preemption.").

Carriers' examples of state regulations that would impede the carriers' national business serve instead to illustrate why attempting to determine if all state oversight and regulation can or should legally be preempted is unwarranted and irresponsible in this proceeding. Generally, carriers offer as examples of purported obstructive billing regulations provisions that have either been unchallenged for more than twenty years, that are not currently in effect, or that do not even address telecommunications billing. Even as to those provisions that are effective, by their selective descriptions, carriers attribute only illusory effects of these statutes or rules. Certainly, carriers have not shown that any of these provisions has ever impeded any of them from competing effectively, or that any of these provisions constitutes rate or entry regulation. None suggest that the FCC should depart from its prior focused approach of examining on a case-specific basis whether a particular state statute or rule strayed into a preempted area.

For example, SBC cites a statute that requires it to identify those components of its bills which are mandated by the FCC.[68] That statute has been law since at least 1983 and was last amended in 1991.[69] SBC claims that multiple required billing formats could frustrate and confuse consumers, particularly, SBC's large customers whose bills may cover several states. Apparently, SBC has never found this billing requirement so overreaching or burdensome to its large customers as to challenge it during those more than 20 years the statute has been in effect. Moreover, the statute does not even require any particular line item, but merely requires, at the carrier's option, that the charges either be identified with an asterisk or similar means referencing a phrase identifying the charges as imposed "by action of" the FCC or requires a listing

---

[68] SBC Comments at 14.

[69] Cal. Pub. Util. Code § 786, West's Annotated California Codes (2005).

somewhere on the bill of the "total charges imposed by tariff" of the FCC.[70]

The Coalition for a Competitive Telecommunications Market ("CCTM") cites a state cramming regulation.[71] As CCTM admits, however, that provision does not even govern billing practices for telecommunications goods or services at all, but, rather services that are *not* telecommunications goods or services.[72] Indeed, the applicable state definition of "telecommunications services" is so broad that the only items left affected by the rule are ones that are neither transmission of information (of any sort) by wire, radio, etc., nor goods and services related to the transmission of information.[73] CCTM even objects to a provision that allows a state utility commission to deny registration if the entity has engaged in "false or deceptive billing practices . . . ." The FCA clearly allows, and courts have upheld, states' power to protect consumers from false and deceptive conduct, even in connection with market entry.[74] In objecting to a carrier having to provide a state with basic information about how it will bill for services, including how often and details of the billing statement,[75] CCTM contends a state might block entry if the state does not like the answers. Whether those particular regulations might be applied so as to deny entry is pure speculation. Such a consideration is best left to a proceeding by a carrier actually denied entry, were there such a carrier, rather than trying to guess at the impact in this general proceeding.

---

[70] Cal. Pub. Util. Code § 786.

[71] CCTM at 8.

[72] CCTM at 8.

[73] New Mexico Admin Code, Title 17 § 11.8.7 O.

[74] *See* 47 U.S.C. § 253(b); *See also* 47 U.S.C. § 332(c)(3)(A); *See also Communications Telesystems Int'l v. California Public Utilities Comm'n*, 196 F.3d 1011, 1017 (9th Cir. 1999).

[75] CCTM Comments p. 7.

Verizon and T-Mobile go so far as to object to state rules that are not even in effect.[76] T-Mobile cites to a state regulation that was never fully implemented.[77] T-Mobile asks the Commission to imagine states promulgating regulations that specify a particular font and font style and how difficult that would be for carriers, but cites to no regulation that has ever specified font style as well as size. Of course, requirements that certain consumer documents be in large enough type to be legible or to call attention to particularly important provisions are commonplace in both federal and state law, and all sorts of other businesses that operate nationally or internationally comply.

The FCC has previously refused to engage in speculation and should not do so now.[78] This restrained preemption conduct has served it well. The examples carriers offer, despite the sky-is-falling rhetoric in which they are cloaked, do not support a break from the Commission's past reasoned approach.

V. The Dormant Commerce Clause Has No Bearing on the Commission's Decision

A couple of industry comments argue that the "dormant" Commerce Clause, U.S. Const. Art. I, § 8, cl.3, presents a constitutional obstacle to the continued role of the states in regulating billing format. For the reasons set forth in the AG Comments,[79] this argument is unconvincing.

First, the dormant Commerce Clause plays no role where, as here, Congress expressly provided

---

[76] Verizon Comments at 18; T-Mobile Comments at 14.

[77] T-Mobile Comments at 14.

[78] *Implementation of Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996: Unauthorized Changes of Consumer's Long Distance Carriers*, 64 F.R. 7746, 7755 (Feb. 1999) (expressing an intent to determine preemption on a case by case basis and refusing to find preemption of state slamming verification procedures absent a sufficient record).

[79] *See* AG Comments at 27-29.

that the states play a regulatory role.[80]

Second, even without such instruction from Congress the Commerce Clause would not prohibit state involvement in truth-in-billing regulation.

Essentially conceding this point, Cingular frames its Commerce Clause argument as one that merely offers "principles" in "support" of *preemption* under the Supremacy Clause, the Commerce Clause is no obstacle in itself to a continued role for the States.[81] The point missed, however, is that the Commerce Clause is no bar to state regulation at issue in this proceeding, principles purportedly embedded in that constitutional provision should not bear on a determination of *preemption* under a wholly separate provision, i.e., the Supremacy Clause, U.S. Const., Art. VI, § 2.

Cingular's non-Commerce clause Commerce clause argument postulates in particular that the resident of one state whose proximity to the borders of other states might require wireless carriers to comply simultaneously with several states' billing-format requirements.[82] But whatever the merits of an *as-applied* constitutional challenge based on that peculiar factual situation, neither Cingular nor any other party could bring a *facial* challenge to a rule based on these circumstances. The burden rests squarely on the party bringing a facial challenge – or, as here, arguing for a complete prohibition – to show that there is no

---

[80] *See White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945).

[81] Cingular Comments at 35.

[82] *See* Cingular Comments at 35-39.

set of facts under which the rule would be constitutional under the Commerce Clause.[83] The carriers have not met that burden, nor can they do so. There is no reason, for example, to believe that more than one state would attempt to regulate billing formats for any given telecommunications consumer. A bill is sent to an address and the address will be in only one state. This fact was relevant to the Supreme Court's analysis upholding the constitutionality under a dormant Commerce Clause analysis of a state tax on telecommunications that was limited to calls charged to an in-state service address. *Goldberg v. Sweet*, 488 U.S. 252, 263 (1989) (noting possibility of states applying tax based on location of service or billing address).

Because wireless service is mobile, the incident that logically ties it to a state is the associated billing address. The likelihood is that states will apply any billing requirements to those calls billed in their state, so there would be no conflict. Moreover, if there were a statute alleged to impose a burden on interstate commerce that would in fact outweigh, under the traditional dormant Commerce Clause balancing test,[84] the benefit to consumers of enhanced clarity and competitive pricing, then those actually affected could bring an as-applied challenge. Such an as-applied challenge would have the salutary feature of addressing an actual rather than hypothetical conflict.

As the *Goldberg* Court recognized in analyzing the statute before it, there are ways of ensuring that marginal problems are addressed without violating fundamental principles of federalism and the dual sovereignty that has long guided telecommunications regulation in this country. *See Goldberg* at 263. For

---

[83] *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982).

[84] *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

well over a century, states have effectively joined with the federal government in regulating the business practices, including the billing practices, of telecommunications providers. Despite carrier' assertions in this proceeding, there is no reason to believe that such a time-tested and reliable format cannot and should not continue to govern the field.

VI. Wireline and Wireless Carriers Should Be Required to Separate Taxes and Fees They Are Mandated to Collect from Customers from Their Own Add-on Charges[85]

Generally speaking, in their written comments, wireline and wireless carriers alike oppose any additional truth-in-billing regulations[86] and/or alternatively advocate for definitions of "mandated" and "non-mandated" charges consistent with their current and varied billing practices.[87] The legal and policy positions articulated by many commentators illustrate the carriers' disparate billing approaches which ultimately confuse and mislead consumers and have resulted in increasing numbers of consumer complaints.

To address the growing problem of confusion with carriers' bills, the Commission should establish national labeling standards that can be enforced at the state level, independently of state consumer protection laws. In this regard, the Commission should follow its proposal to define "mandated" charges as "amounts that a carrier is required to collect directly from customers, and remit to federal, state or local

---

[85] In initial comments, the States argued for the establishment of two categories of charges: (1) price, and (2) taxes and regulatory fees. More specifically, the States urge the Commission not to allow carriers a third category referred to as "carrier add-on charges." The recovery of charges under this later category, which includes discretionary line items, should be incorporated into the price for the service. In the alternative, the State argued for three categories: (1) price, (2) taxes and regulatory fee; and (3) carrier add-on charges. Without waiving their preference for two categories of charges, the States respond to carriers' proposed definitions of "mandated" and "non-mandated" charges.

[86] *See* SBC Comments at 3-4; T-Mobile Comments at 1; and Comments of the National Telecommunications Cooperative Association, the Organization for the Promotion and Advancement of Small Telecommunications Companies and the Western Telecommunications Alliance at 2 (Small Carriers Comments).

[87] *See* Nextel Comments at 4 and 8; Cingular Comments at 46-47.

governments" and require that "mandated" charges be listed separately from "non-mandated" charges. The States recommend that "mandated" charges be referred to as "Taxes and Regulatory Fees" and "non-mandated" charges be referenced as "Carrier Add-On Charges" on customers bills.

Verizon Wireless claims in its initial comments that there are three kinds of charges that carriers typically collect from customers: (1) charges that the government requires a carrier to collect from its customers and remit, such as a sales tax; (2) charges the carrier estimates it owes a governmental entity, such as federal universal service or property tax; and (3) charges that carriers impose on customers but the carrier does not owe to the government.[88] As explained in their initial comments, the State Attorneys General note that there are really only two kinds of charges: "taxes and regulatory fees" that carriers are required to collect from customers and remit to the government and "carrier add-on charges"[89] that carrier impose on customers at their discretion and keep as revenues.

The Commission offered, however, two alternative proposals to address line items. Under the Commission's first proposal, the first category of charges listed above would be defined as "mandated" charges, and categories two and three would be considered "non-mandated" charges (hereinafter "Proposal 1"). In contrast, under the Commission's second proposal, categories one and two would be defined as "mandated" charges and category three would be considered "non-mandated" charges (hereinafter "Proposal 2"). Proposal 1 is more consistent with the position of the Attorneys General in the their initial comments, although we reiterate that non-mandated charges should be incorporated into the price for the service.

[88] Verizon Wireless Comments at 39-40.

[89] AG Comments at 1.

In their comments, carriers took disparate positions consistent with their billing systems and circumstances, but basically made recommendations that fall into four categories: (1) separate "mandated" and "non-mandated" charges following Proposal 1;[90] (2) separate "mandated" and "non-mandated" charges following Proposal 2;[91] (3) eliminate distinction between "mandated" and "non-mandated" charges and identify *all* government imposed fees, whether required or permitted to be passed on to consumers as "government-mandated charges," and allow carriers to fashion other categories of charges as they see fit;[92] and (4) do nothing because there is no need for further truth-in-billing rules.[93]

The Attorneys General submit that the most logical of the listed recommendations for the Commission to adopt is Proposal 1 because the other alternatives lead to greater billing confusion. Any definition of "mandated" or "government-mandated" charges that allows carriers to list assessments that the government requires carriers to remit, but does not require carriers to collect from customers, such as federal universal service, is *per se* misleading – because the customer will wrongly conclude that the discretionary carrier add-on charges are government-imposed. Consequently, the consumer does not have complete and accurate information necessary to compare prices among competitors.

In a broader sense, the Commission has framed the debate over "mandated" and "non-mandated" charges in terms of whether it should model proposed rules based on the Assurance of Voluntary Compliance (AVC) that the top three wireless carriers signed originally with 32 states, or the CTIA Code

---

[90] *See* Cingular Comments at 47; Nextel Comments at 3; and Verizon Wireless at 40.

[91] *See* T-Mobile Comments at 8; CTIA Comments at 8; and CCTM Comments at 16.

[92] *See* SBC Comments at 4; Sprint Comments at 19; and AT&T Comments at 6-7.

[93] *See* Small Carrier Comments at 4; and Verizon Comments at 2.

that has been voluntarily signed by over 30 small and large wireless carriers. The Commission acknowledged that Proposal 1 is consistent with the AVC, while Proposal 2 is similar in approach to the CTIA Code.[94] For the same reason expressed above, the Commission should fashion its truth-in-billing rules after the AVC. To do otherwise would give carriers a license to mislead consumers.

On the question of whether it is unreasonable for line items to combine federal regulatory charges, AT&T supports the proposition on the basis that the Commission has failed to explain why such charges must be set forth in separate line items if their description in a single line item combining those charges is clear.[95] This response would be reasonable only under certain circumstances. The approach to this question depends on how the Commission addresses the issue of how to define "mandated" and "non-mandated" charges. If Proposal 1 is followed, and "mandated" fees are limited to charges that carriers are required to collect from consumers and remit to the government, then the combination of several mandated federal regulatory charges under one line item would raise little concern, beyond full disclosure of itemized charges to the consumer. However, if Proposal 2 is followed, then combining so-called regulatory charges under the same line item without further itemization of the charges would raises serious concerns because carriers could hide administrative and other discretionary charges as "mandatory" charges. Under this scenario, it would be possible for a carrier to be in compliance with Commission regulations, yet mislead and deceive consumers. This approach leads to irrational pricing as discussed in section II of these reply comments.

---

[94] Second FNPRM at ¶¶ 40-41.

[95] AT&T Comments at 10-11.

On the issue of whether labeling requirements should stop at separating government "mandated" and "non-mandated charges," or whether there should be more specific standardized labeling of categories of charges establishing national uniformity, Sprint, AT&T, Verizon Wireless, and CCLM raised strong objections to labeling beyond the separation of "mandated" and "non-mandated" charges.[96] AT&T and Verizon Wireless support their position with legal arguments based on the First Amendment (these arguments are addressed in section VIII of these reply comments), while Sprint and CCLM argue that such labeling is inconsistent with how carriers may structure their rates in a competitive market. In this regard, CCLM opposes labeling requirements that would prohibit carriers from developing their own naming conventions for line items. Specifically, CCLM argues, that carriers should be free to recover expenses such as "property taxes, regulatory compliance costs and billing expenses" under line items labeled "regulatory assessment fees" or "universal connectivity charge," or other carrier-prescribed label.[97]

CCLM's argument illustrates the problem with the current debate. On the one hand, carriers claim that in a competitive market they should be free to recover expenses as line items on bills because this is part of structuring their own rates and the Commission should not "micro-manage" this process. On the other hand, however, they fail to show restraint in the manner in which they would recover such expenses to the point of misleading consumers. They argue that the Commission cannot or should not establish labeling requirements for line items on bills that at a minimum separate "mandated" and "non-mandated" charges. CCLM would have carriers recover as "regulatory assessment fees" – a category of charges deceptively phrased as a mandatory fees – taxes that are not triggered by the sale of telecommunications

[96] *See* Sprint Comments at 19; AT&T Comments at 7-9; Verizon Wireless Comments at 41-45; and CCLM Comments at 18.

[97] CCLM Comments at 18.

services (property taxes), discretionary carrier add-on charges (regulatory compliance costs), and cost of doing business (billing expenses). Property taxes and billing expenses should be integrated into the price for the service as is customary in other industries subject to competition. In turn, discretionary charges, if not part of that price, should be properly identified as "carrier add-on charges" on carrier bills.

At a minimum, the Commission should establish federal labeling requirements for "mandated" charges consistent with the AVC. However, the Commission should not create a "safe harbor" that would insulate carriers from state consumer protection laws. As the examples above show, it is possible for carriers to be in compliance with federal regulations and still mislead or deceive consumers. To the extent that the Commission establishes new truth-in-billing regulations, they should act as a floor of consumer billing protection, allowing states to continue to address carriers that use misleading or unfair billing practices that confuse customers or make it difficult or impossible for consumers to compare prices. This model of shared state/federal enforcement authority has worked well in the context of billing and there is no reason to change it now and undermine the flexibility that states have in responding to carriers that engage in deceptive billing practices which confuse and mislead consumers.

VII. Requiring Carriers to Provide Customers with Point of Sale Disclosures Prior to the Customer Signing a Contract Will Promote Informed Customer Choices and Competition

Comments submitted by members of the wireless industry suggest that there is no widespread or strong opposition to the Commission's proposal to require carriers to provide consumers with point of sale disclosures, and some affirmatively state that they do not oppose the imposition of this type of requirement. One carrier (Verizon Wireless) challenges the FCC to first obtain empirical evidence before imposing this requirement and others do not directly address the question posed by the FCC regarding whether or not

such disclosures are needed.

With respect to the substance of point of sale requirements, the carriers generally take the position that such should be consistent with the AVCs; that the Commission should allow carriers to disclose a range of potential surcharges, so long as the consumer is apprised of the highest potential amount. Some carriers emphasize that the FCC should clarify that carriers should be required to disclose only the information that is known to them as they cannot foresee how taxes and fees might change. One carrier takes the position that the FCC's proposal to disclose the full rate is faulty because the FCC fails to define "full rate" and further urges that it is impossible for point of sale disclosures to be made before a consumer signs a contract since customers must choose all features and provide addresses BEFORE the carrier can provide full rate information and that billing cycle information is not available until a customer activates service which only occurs after a contract is signed.

With respect to the proposed requirement of point of sale disclosures, the FCC's articulated goals are "to facilitate the ability of telephone consumers to make informed choices among competitive telecommunications services" and to have "these obligations apply nationwide to all carriers."

The States, on the basis of their respective experiences with consumer complaints and related investigations and enforcement actions, submit that without point of sale disclosures regarding material terms of service, consumers cannot make informed choices. Indeed it was in part on the basis of this experience that 32 states undertook the actions which resulted in settlements with three major wireless carriers in which those three agreed to provide consumers with point of sale disclosures. Requiring that these point of sale obligations apply nationwide to all carriers would level the playing field. Further, it would cause carriers

to fall into compliance with state consumer protection laws which they would otherwise be in violation of by failing to disclose material terms to consumers.

While the States agree that the FCC's requirements regarding point of sale disclosures should be consistent with those embodied in the AVCs, the States note that the AVCs do not dictate an all inclusive list of information that must be disclosed at point of sale. Instead, the AVCs require that carriers disclose "all material terms and conditions of an offer," *including* a list of specific items. This approach recognizes that in an industry characterized by rapidly evolving technology and competitive pressures, the material terms which consumers may need to know in order to make an informed choice are not likely to remain static and may vary from region to region. Further, information related to innovations in service can be most critical to disclose to consumers since it is such information with which they are the least likely to be familiar.

In terms of whether point of sale disclosures should be made prior to a consumer signing a contract, the States strongly concur with the FCC's tentative conclusion that these must be made before the consumer signs the contract. In fact, providing these disclosures to a consumer only AFTER he signs a contract would clearly undermine the stated goal of facilitating the consumer's ability to make an informed choice. If disclosures are required only AFTER the signing of a contract, a consumer's comparison shopping would require the signing of a series of contracts in order to determine the cost of services. To the extent that some carrier's systems are not currently set up to facilitate providing this material information to consumers prior to the time that the consumer obligates him or herself by signing a contract, the States suggest that the FCC consider a phase in period to give these carriers time to implement changes to their

systems. Finally, with respect to allowing carriers to utilize an estimate for taxes and regulatory fees in these disclosures, the States urge that the actual charge to the consumer ultimately not be in excess of 10% greater than the estimated surcharge.[98] To the extent that the Commission requires the inclusion of specific terms in point of sale disclosures, the States would urge the Commission to assure that terms used in the point of sale disclosures be consistent with terms used in consumers' bills.

VIII. The Disclosure of Line Items on Bills Does Not Violate the First Amendment

The argument that disclosure requirements violate the First Amendment rights of carriers is incorrect. Disclosure requirements receive less First Amendment protection than restrictions on commercial speech. Disclosure requirements need only be "... reasonably related to the State's interest in preventing deception of consumers." *Zauderer v. Office of the Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

It is not certain that the act of adding line items to a bill is speech. The Supreme Court has said, "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 392 U.S. 367, 376 (1968).

In addition to the issue of its own First Amendment rights, the industry has raised as an issue the First Amendment rights of consumers. In this context, bill recipients are analogous to a captive audience. *See Frisby v. Schultz*, 487 U.S. 474, 485 (1988); *Rowan v. United States Post Office Department*, 397 U.S. 728, 738 (1970). The fact that customers cannot merely discard their bills distinguishes this fact

[98] For example, if the estimated taxes and regulatory fees disclosed are $5.00, the ultimate charge to the consumer should not exceed $5.50.

pattern from the cases addressing First Amendment rights in the context of billing inserts and unsolicited mail.

Even if adding line items to a bill is speech and even if a bill recipient is not a captive audience, the nature of a bill as a demand for money from the bill recipient is a significant factor in the First Amendment analysis. According to the Supreme Court, "Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeastern Promotions v. Conrad*, 420 U.S. 546, 557 (1975).

Moreover, there is no First Amendment protection for misleading speech, e.g., like the deceptive line items illustrated above. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980). Even if one were to argue that not every line item is *per se* misleading, regulations on them clearly would be reasonably related to the government's interest in preventing deception of consumers. *Zauderer v. Office of the Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985).

IX. Any Enforcement Regime Adopted by the Commission Should Recognize the Value of State Federal Partnerships in Protecting Consumers and Promoting Fair Competition

With respect to enforcement matters, industry representatives almost uniformly oppose granting states enforcement authority, arguing that to allow such would in effect permit states to adopt their own rules and that since some of these rules will necessarily be ambiguous, there needs to be a "single adjudicator" and that the FCC may not lawfully subdelegate its authority to states. In response to the Commission's question regarding whether a federal/state enforcement regime similar to that which is in place with respect to "slamming" might be appropriate, many carriers' comments reflect the view that this

is not a good model since slamming concerns a factual question of whether a consumer agreed to switch carriers or not, in contrast to the proposed rules which will, in the carriers' view, be subject to a greater range of interpretations. Almost all of the carriers concede that the states have a significant role to play with respect to these issues through their enforcement of laws of general applicability, such as consumer protection laws. The undercurrent flowing through this concession, however, consists of numerous statements by carriers suggesting that even those enforcement efforts and laws might be preempted in unspecified circumstances when such enforcement in some way "interferes" with federal policies or somehow amounts to back door regulation.

The States note first, that by seeking to establish an enforcement regime that recognizes the value of partnership with the States, the FCC is recognizing the role Congress granted to the states over "terms and conditions" under Section 332. A federal/state partnership with respect to enforcement is consistent with Section 332 and is, therefore, not an unlawful subdelegation of FCC authority to states. Second, the States urge the Commission to reject suggestions that consumer enforcement protection must be set aside whenever carriers advance the argument that such enforcement amounts to an interference with "federal policies." Failure to reject those suggestions invites carriers to later utilize any rules adopted by the Commission to attempt to assert sanctuary from state consumer protection efforts. Third, the States submit that the slamming model suggested by the Commission for an enforcement regime is a sound one which has been effectively utilized to substantially reduce the incidence of slamming complaints across the country. Contrary to the suggestion that enforcement of slamming rules is not a good model because the factual determination in those cases is a simple one subject to little interpretation, the States note that enforcement decisions regarding slamming rules, as is the case with most laws and regulations, of necessity includes

elements of analysis, evaluation and judgment. For instance, the rules regarding letters of agency authorizing a change in carrier require that such be "at a minimum" printed with a type of "sufficient size and readable type to be clearly legible" and must contain disclosures of certain information using "clear and unambiguous language."[99] Similarly, in reviewing recorded verifications of authorizations state and federal enforcement authorities necessarily must evaluate whether carriers clearly disclosed to consumers that what they were authorizing was a switch in service providers. The slamming model is also far superior to the suggestion offered by carriers that the role of the states should be limited to receiving complaints, forwarding them to carriers for responses and in certain instances forwarding these complaints to the FCC for investigation. This latter proposal suggests a regime which would inefficiently use state government resources, frustrate consumers seeking relief and would limit enforcement to only those circumstances so egregious or widespread that the Commission deems them worthy of a federal enforcement action. Finally, the States would reurge the Commission to continue to recognize the value of the federal/state partnership which has served to protect consumers and promote fair competition in the marketplace.

Respectfully submitted,

[99] *See* 47 C.F.R. §§ 64.1130(d) and (e).

David Marquez
Attorney General of Alaska

Malaetasi M. Togafau
Attorney General of American Samoa

Terry Goddard
Attorney General of Arizona

Mike Beebe
Attorney General of Arkansas

Bill Lockyer
Attorney General of California

John Suthers
Attorney General of Colorado

Richard Blumenthal
Attorney General of Connecticut

M. Jane Brady
Attorney General of Delaware

Robert J. Spagnoletti
Attorney General of District of Columbia

Charlie Crist
Attorney General of Florida

Thurbert E. Baker
Attorney General of Georgia

Steve Levins, Executive Director
Hawaii Ofc. Consumer Protection

Mark J. Bennett
Attorney General of Hawaii

Lawrence Wasden
Attorney General of Idaho

Lisa Madigan
Attorney General of Illinois

Steve Carter
Attorney General of Indiana

Tom Miller
Attorney General of Iowa

Gregory D. Stumbo
Attorney General of Kentucky

Charles C. Foti Jr.
Attorney General of Louisiana

G. Steven Rowe
Attorney General of Maine

J. Joseph Curran Jr.
Attorney General of Maryland

Tom Reilly
Attorney General of Massachusetts

Mike Cox
Attorney General of Michigan

Mike Hatch
Attorney General of Minnesota

Jim Hood
Attorney General of Mississippi

Jeremiah W. (Jay) Nixon
Attorney General of Missouri

Mike McGrath
Attorney General of Montana

Brian Sandoval
Attorney General of Nevada

Kelly Ayotte
Attorney General of New Hampshire

Peter C. Harvey
Attorney General of New Jersey

Patricia A. Madrid
Attorney General of New Mexico

Eliot Spitzer
Attorney General of New York

Roy Cooper
Attorney General of North Carolina

Wayne Stenehjem
Attorney General of North Dakota

Pamela Brown
Attorney General of Northern Mariana Islands

Jim Petro
Attorney General of Ohio

W. A. Drew Edmondson
Attorney General of Oklahoma

Hardy Myers
Attorney General of Oregon

Tom Corbett
Attorney General of Pennsylvania

Robert J. Sanchez Ramos
Attorney General of Puerto Rico

Patrick Lynch
Attorney General of Rhode Island

Henry McMaster
Attorney General of South Carolina

Larry Long
Attorney General of South Dakota

Paul G. Summers
Attorney General of Tennessee

Greg Abbott
Attorney General of Texas

Mark Shurtleff
Attorney General of Utah

William H. Sorrell
Attorney General of Vermont

Judith W. Jadgmann
Attorney General of Virginia

Rob McKenna
Attorney General of Washington

Darrell Vivian McGraw, Jr.
Attorney General of West Virginia

Peg Lautenschlager
Attorney General of Wisconsin

Pat Crank
Attorney General of Wyoming